

February 24, 2012

via electronic filing

Marlene H. Dortch, Secretary
Federal Communications Commission

RE: Notice of *Ex Parte* Presentation

Closed Captioning of Internet Protocol-Delivered Video Programming
MB Docket No. 11-154

Closed Captioning of Video Programming, Telecommunications for the Deaf
and Hard of Hearing Inc., Petition for Rulemaking
CG Docket No. 05-231

Anglers for Christ Ministries, Inc., Video Programming Accessibility
CG Docket No. 06-181

Standardizing Program Reporting Requirements for Broadcast Licensees
MB Docket No. 11-189

Dear Ms. Dortch:

On Wednesday, February 22, 2012, Jim House, Outreach Coordinator for CEPIN at Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Shane Feldman, Chief Operating Officer, National Association for the Deaf (NAD), Andrew Phillips, Policy Attorney, NAD, Dr. Christian Vogler, Director, Technology Access Program (TAP), Gallaudet University, Lise Hamlin, Director of Public Policy, Hearing Loss Association of America, Cheryl Heppner, Advocacy Chair, Association of Late-Deafened Adults, Brennan Terhune-Cotter, Intern, TDI, Joseph Mosley, Intern, TDI, Blake Reid, Staff Attorney, Institute for Public Representation (IPR), Allyn Ginns, Student Clinician, IPR, and Cathie Tong, Student Clinician, IPR, (collectively "Consumer Groups") met with Jeffrey Neumann, Media Bureau, Diana Sokolow, Media Bureau, Rosaline Crawford, Consumer Groups Bureau and Disability Rights Office, Karen Strauss, Consumer Groups Bureau, and Eliot Greenwald, Consumer Groups Bureau and Disability Rights Office, to discuss the above-referenced matters.

We expressed new concerns about the Commission's decision not to require the captioning of video clips in the Internet Protocol (IP) Captioning Report and Order, particularly in light of the ongoing lawsuit by the Greater Los Angeles Agency on Deafness (GLAD) against Cable News Network, Inc. (CNN) for failing and refusing to caption online video content on CNN.com.¹ We noted that prior to the release of the Report and Order, CNN argued that GLAD's lawsuit should be dismissed because the Commission would impose captioning regulations for sites like CNN.com, and therefore that any judicial imposition of captioning requirements would "place CNN in an impossible position of having

¹ *GLAD, et al. v. Time Warner*, No. 4:11-cv-03458-LB, 2011 (N.D. Cal.).

to comply with conflicting state and federal requirements.”² Furthermore, CNN, argued that such an imposition would violate the First Amendment because requiring the use of “current sub-par closed captioning technology” would result in inaccuracies that would not satisfy CNN’s “editorial standards.”³

We noted both language in the IP Captioning Report and Order and remarks by Commission staff indicating that the Commission would pay close attention to the accessibility of video clips to ensure that programming distributors do not exploit the omission of video clips from the IP captioning rules as a loophole to deny viewers who are deaf and hard of hearing equal access to news and other important programming. We fear that CNN’s position in the GLAD lawsuit indicates that video distributors will seize upon the lack of clip captioning requirements as an excuse not to caption clips, treating the Commission’s rules as a ceiling for accessibility efforts rather than a floor.

We also shared our deep concern about CNN’s assertions that the “sub-par” quality of closed captioning technology should serve as an excuse not to caption its programs, particularly in light of the strong industry resistance to captioning quality standards in the Commission’s ongoing captioning quality proceeding.⁴ It is unreasonable and unfair for industry representatives to oppose quality standards in one context and then insist in another that they cannot provide captions because of the lack of quality standards.

Next, we discussed whether any combinations of video, distribution service, and player might fall into a gap between the Commission’s rules under section 202(b) of the Twenty First Century Video Accessibility Act (“CVAA”) on the one hand, and under section 203 of the CVAA on the other, where no entity would bear responsibility for ensuring that captions are displayed. Based on the comments of Commission staff, it is our understanding that situations where neither a video programming distributor nor an apparatus manufacturer would bear responsibility for the failure of a player to display captions could only arise where a captioned video is distributed without digital rights management (DRM) technology for viewing with a captioning-enabled, standards-compliant player of a consumer’s choice. If a video’s distributor requires a consumer to use a particular player or limits a consumer’s choice of player by utilizing DRM or non-standard video or captioning technology, then the distributor should retain responsibility for ensuring that the player or players at issue are fully compliant with the captioning requirements of section 203, including CEA-708 features.

² See CNN Special Motion to Strike Plaintiff’s Complaint, at 13 (Sept. 12, 2011) (attached).

³ CNN Supplemental Brief Supporting Special Motion to Strike at 12-13 (Jan. 9, 2012) (attached).

⁴ E.g., Reply Comments of The National Cable & Telecommunications Association, FCC Docket No. CG 05-231 (Dec. 9, 2010), available at <http://apps.fcc.gov/ecfs/document/view?id=7020922780>.

We also noted our concern that the IP Captioning Report and Order does not require apparatus manufacturers to comply with the VPAAC's recommended timing and synchronization principles. We acknowledged that timing and synchronization issues may arise in the process of encoding and distributing captions long before they reach an apparatus, and that those issues may be addressed by video programming owners and distributors pursuant to their obligations under section 202(b) of the CVAA or in the Commission's caption quality proceeding. Nevertheless, we distinguished between timing and synchronization problems stemming from the encoding and distribution of captions from problems introduced at the apparatus level, and expressed our concern that efforts to eliminate the former problems may be for naught if the latter problems are not eliminated as well.

We further requested clarification on the difference, if any, between the standards for economic burden exemptions in the IP and TV contexts. Commission staff assured us that requests for exemption from IP captioning rules must demonstrate an undue economic burden above and beyond the burden of simply captioning programming in the first place, given that a program must necessarily have been published or exhibited on television with captions to be subject to the IP captioning rules. We also encouraged the Commission to explore improvements in its procedures for keeping the public informed of the filing and status of petitions for economic burden exemptions from both the TV and IP captioning rules well as other exemption and waiver requests under the IP captioning rules.

Finally, we discussed the important accessibility issues under consideration in the Media Bureau's ongoing enhanced disclosure proceeding, including requiring broadcasters to report programs that are not captioned, the reasons why those programs are not captioned, and complaints about the accessibility of emergency information.

Respectfully submitted,

/s/

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16 CABLE NEWS NETWORK, INC. (incorrectly sued as
17 TIME WARNER INC.)

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 GREATER LOS ANGELES AGENCY ON DEAFNESS, INC., DANIEL JACOB,
21 EDWARD KELLY and JENNIFER OLSON,) Case No. 4:11-cv-03458-LB
22 on behalf of themselves and all others similarly)
23 situated,) **DEFENDANT CABLE NEWS NETWORK,**
24) **INC.'S NOTICE OF MOTION AND**
25) **SPECIAL MOTION TO STRIKE**
26) **PLAINTIFFS' COMPLAINT**
27)
28)
Plaintiffs,)
vs.) Date: October 20, 2011
Time: 11:00 a.m.)
TIME WARNER INC., a Delaware)
Corporation,) Assigned to the Honorable Laurel Beeler
Courtroom 4)
Defendant.)
Action Filed: June 15, 2011)
Action Removed: July 14, 2011)

1 TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on October 20, 2011, at 11:00 a.m. or as soon thereafter as
3 counsel may be heard before the Honorable Laurel Beeler, in Courtroom 4, Third Floor, located at
4 1301Clay Street, Oakland, CA 94612, Cable News Network, Inc. (“CNN”), incorrectly sued
5 herein as Time Warner Inc. (“Time Warner”) will and hereby does move this Court, pursuant to
6 California Code of Civil Procedure (“C.C.P.”) Section 425.16, for an order striking Plaintiffs’
7 claims in the Complaint. CNN’s Special Motion to Strike is based on this Notice, the
8 accompanying memorandum of points and authorities, and the concurrently filed declarations of
9 Michael Toppo, Clyde D. Smith, and Thomas R. Burke and accompanying Exhibits A to J.

10 This Motion is made on the grounds that Plaintiffs’ claims fall squarely within the
11 scope of C.C.P. Section 425.16 and subsection (e)(4), because both claims indisputably arise
12 from CNN’s newsgathering and dissemination of news concerning matters of substantial public
13 interest (video news reports publicly available on CNN.com). Consequently, the burden shifts
14 to Plaintiffs to present evidence establishing a probability that they will prevail on their claims.
15 *See* C.C.P. § 425.16(b)(1). Plaintiffs cannot meet this burden for a variety of independent
16 reasons. Specifically:

17 1. Plaintiffs’ claims under the California Disabled Persons Act, California Civil Code
18 Section 54 *et seq.* (the “CDPA”) and the Unruh Civil Rights Act, California Civil Code Section
19 51 *et seq.* (the “Unruh Act”) are preempted, because Congress expressly intended to occupy and
20 has occupied the entire field of closed captioning regulation of television programming and video
21 over Internet protocol through the adoption of Section 713 of the Telecommunications Act
22 governing “Video Programming Accessibility” and later with the Twenty-First Century
23 Communications and Video Accessibility Act of 2010 that amended it. Further, imposing
24 California law to require closed captioning on Internet video programming would directly
25 conflict with the federal policy favoring uniform closed captioning of online video.

26 2. Plaintiffs’ claims under the CDPA and the Unruh Act are barred because the Federal
27 Communications Commission (“FCC”) has exclusive jurisdiction over all closed captioning

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

By this putative class action lawsuit, Plaintiffs seek an order from this Court compelling Cable News Network, Inc. (“CNN”) (incorrectly sued as Time Warner Inc.) – and CNN *alone* – to immediately provide real-time closed captions on all news videos posted on www.CNN.com, under the California Disabled Persons Act, Cal. Civil Code Section 54 *et seq.* (the “CDPA”), and Unruh Civil Rights Act, Cal. Civil Code Section 51 *et seq.* (the “Unruh Act”). Not only is this technologically not possible now, this demand occurs just as the Federal Communications Commission (“FCC”) is poised to announce a federal online closed captioning regulations that the industry is preparing to implement. This would provide the very relief Plaintiffs seek in a uniform manner that does not disrupt CNN or unfairly burden its rights. CNN recognizes the importance of closed captioning and has, for years, actively contributed to the development of universal captioning standards, including captioning online. Indeed, CNN was working with the FCC toward recommending standards for Internet captioning well before Plaintiffs first contacted CNN.

The FCC’s regulations, which are expected to establish a single publication standard for all Internet videos previously aired on television, are due to issue in just a few months – by January 13, 2012. Both equipment manufacturers and online publishers have been and must be part of this process. And CNN technical support personnel are prepared to implement online captioning technology for CNN.com as promptly as possible after the regulations issue.

Plaintiffs’ demand that CNN provide online closed captioning for all news videos hosted on CNN.com ignores the reality of the current marketplace. In the absence of mandatory single standards for closed captioning, consumers now access video online using a variety of different video players, web browsers and platforms. Forcing CNN to implement an unworkable stop-gap solution now, cannot, as a practical matter, be implemented before the FCC announces federal regulations, and will slow news postings to CNN.com. Moreover, exclusively requiring CNN.com to implement imprecise current online captioning technology also will impermissibly burden CNN’s constitutionally protected speech – but none of its news competitors – by diverting vital

1 company resources away from news reporting and compliance with the forthcoming national
2 standard.

3 Plaintiffs' Complaint that targets only CNN's newsgathering and publishing activities in
4 the dissemination of time-sensitive news and information through CNN.com to its global audience
5 indisputably raises claims arising out of CNN's First Amendment--protected free speech activities
6 involving matters of substantial public interest. Plaintiffs' claims are, therefore, subject to
7 dismissal under California's statute targeting "Strategic Lawsuits Against Public Participation," *i.e.*,
8 its anti-SLAPP law, C.C.P. § 425.16, which was expressly designed by the California Legislature
9 "to nip SLAPP litigation in the bud[]" by quickly disposing of claims that target the exercise of
10 free-speech rights. *Braun v. Chronicle Publ'g*, 52 Cal. App. 4th 1036, 1042 (1997). Under the
11 statute, any "cause of action against a person arising from any act ... in furtherance of the person's
12 right of ... free speech ... in connection with a public issue shall be subject to a special motion to
13 strike, unless the court determines that the plaintiff has established that there is a probability that
14 the plaintiff will prevail on the claim." C.C.P. § 425.16(b)(1). Section 425.16 "shall be construed
15 broadly." C.C.P. § 425.16(a)(1); *Briggs v. Eden Council*, 19 Cal. 4th 1106, 1120-21 (1999).

16 Under the anti-SLAPP statute, Plaintiffs must prove – with admissible evidence – that they
17 have a probability of success on the merits of their lawsuit. C.C.P. § 425.16 (b)(1). Yet, Plaintiffs'
18 Complaint is legally barred by seven different legal defenses. Each of these individually, and
19 collectively, require this Court to grant CNN's Special Motion to Strike and dismiss Plaintiffs'
20 Complaint with prejudice.

21 *First*, Plaintiffs' claims are preempted by the Federal Communications Act, because
22 Congress expressly intended to "occupy the field" of closed captioning through adoption of Section
23 713 of the 1996 Telecommunications Act governing "Video Programming Accessibility" and its
24 later amendment by the Twenty-First Century Communications and Video Accessibility Act of
25 2010. Imposing California law on CNN, by interpreting the Unruh Act and the CDPA to require
26 closed captioning on news videos hosted on CNN.com would also directly conflict with the
27 federal policy favoring uniform closed captioning standards. *See infra* § IV.A.

1 *Second*, Plaintiffs’ claims are barred because the FCC has exclusive jurisdiction over closed
2 captioning matters pertaining to video programming accessibility, or in the alternative, are barred
3 because the Court should dismiss Plaintiffs’ Complaint and refer the claims to the FCC under the
4 doctrine of primary jurisdiction. *See infra* § IV.B.

5 *Third*, Plaintiffs’ claims are barred because application of the CDPA and the Unruh Act as
6 Plaintiffs request would violate CNN’s rights under the First Amendment to the United States
7 Constitution and article I, section 1 of the California State Constitution. *See infra* § IV.C.

8 *Fourth*, Plaintiffs’ claims are barred because applying California law as set forth in the
9 Complaint would impermissibly burden interstate commerce in violation of the dormant Commerce
10 Clause. *See infra* § IV.D.

11 *Fifth*, Plaintiffs’ claims under the CDPA are barred because CNN.com is not a “public
12 place” under the CDPA. *See infra* § IV.E.

13 *Sixth*, Plaintiffs’ Unruh Act claims are barred because CNN did not treat Plaintiffs
14 differently because of their disabilities or apply its policies in a manner that targets persons with
15 disabilities. *See infra* § IV.F.

16 *Seventh* and finally, Plaintiffs’ claims under Section 54(c) of the CDPA and Section 51(f)
17 of the Unruh Act are barred because, as to CNN.com, CNN is not a person that owns, leases (or
18 leases to) or operates a place of public accommodation under the Americans with Disabilities Act
19 (“ADA”). *See infra* § IV.G.

20 Furthermore, CNN has been actively participating with the FCC in efforts to design and
21 implement federal captioning standards, and the FCC is expected to announce universal standards
22 soon. The relief the Complaint seeks cannot be accorded Plaintiffs as they demand, but rather
23 would result in less expeditious, less effective, and less inclusive captioning of news videos at
24 CNN.com. Plaintiffs’ lawsuit unlawfully seeks to interfere with the FCC’s efforts and should be
25 dismissed for all these reasons.

II. FACTUAL BACKGROUND

On December 14, 2010, Plaintiffs wrote CNN inquiring about closed captioning on news videos hosted on CNN.com.¹ After trading correspondence on December 28, 2010 and February 23, 2011, *see* Burke Decl. ¶¶ 3-4, Exhs. C&D, counsel for CNN responded in a letter dated February 28, 2011 confirming CNN's commitment to making CNN.com accessible to everyone, but noting the absence of federal standards for the closed captioning of Internet-delivered video content. Burke Decl. ¶ 5, Exh. E. Plaintiffs made no further contact with CNN until, three months later, Plaintiffs filed this action. *See* Burke Decl. ¶ 6, Exh. F (letter notifying CNN counsel of this lawsuit).

The overarching mission of CNN and CNN.com, which share news-reporting and content-production resources, is to provide the most compelling content and pertinent news and information to a global audience, and, in particular, to report and offer commentary on domestic and international matters of public concern. CNN's television programming is transmitted with closed captioning consistent with, and based on technical standards established by, rules adopted and enforced by the FCC. In contrast to closed captioning on television, there are currently no universally adopted industry standards for online closed captioning in the United States. Nor are there FCC rules on the format of closed captioning for the Internet and for broadband devices that software developers or manufacturers can follow. Thus, unlike the universal standards that are now built into the manufacturing of television receivers, no universal standard for online closed captioning exists for the multitude of devices that carry online video.

In the absence of mandatory compliance with a single standard, a number of proprietary techniques and proposed standards have been developed, but the majority of websites have not licensed these non-uniform, proprietary systems. This is in part because online video producers and their distribution systems and partner systems must accommodate a wide variety of video

¹ Declaration of Thomas R. Burke ("Burke Declaration") ¶ 2, Exh. B. The letter was directed to the Executive Vice President and General Counsel of Time Warner, the ultimate corporate parent of CNN.

1 formats (.mpeg, .mov, .wmv, .rm, and others), video players (QuickTime, Flash, Windows Media
2 Player, and others), web browsers (Explorer, Firefox, Safari, Chrome, and others), and different
3 platforms (Windows, Apple, Linux). If they do not, they will exclude various segments of the
4 public (depending on which formats, players, and/or platforms they may use) from accessing the
5 captioning. These proprietary captioning methods also present a variety of serious content and
6 quality concerns. Words and sometimes entire sentences of content can be inadvertently omitted,
7 so as to entirely change the meaning of the content, which is, of course, of critical concern in
8 the context of news reporting. Closed captioning on mobile and portable devices poses further
9 difficulties because certain mobile phones support proprietary applications for media viewing,
10 others allow web access and/or apps, and still others do not support some video formats.

11 The industry has known since 2009 that closed captioning for online videos, which would
12 likely include government-set standards that apply across the industry, were being contemplated.
13 Given the significant expense of proprietary captioning solutions and their technical limitations,
14 CNN has been actively participating in development of government standards before investing
15 in technologies to closed-caption Internet protocol video (“IP Video”). This move toward
16 standardization was solidified with passage of the Twenty-First Century Communications and
17 Video Accessibility Act, Pub. L. No. 111-260, 124 Stat. 2751, as amended by Pub. L. No. 111-265,
18 124 Stat. 2795 (Oct. 8, 2010) (“CVAA”) (attached as Exh. G to the Burke Declaration). The
19 adoption of a single publication format for online closed captioning by the FCC under the CVAA
20 will permit software and devices rendering covered content to ensure the accurate, timely and
21 interoperable exchange and display of captioning information in an orderly manner. On a separate
22 track, in December of 2010, an open-process, accredited international standards body, the Society
23 of Motion Picture and Television Engineers (“SMPTE”), passed a standard specifically developed
24 for and capable of full and faithful reproduction of current broadcast/telecast captions in the
25 Internet/broadband space, called SMPTE-2052.

26 On July 13, 2011, the Video Programming Accessibility and Advisory Committee that the
27 FCC appointed under the CVAA (the “VPAAC”), submitted to the agency its First Report under
28

1 the CVAA on Closed Captioning of Video Programming Delivered Using Internet Protocol
2 (“VPAAC Report”). In that Report (attached as Exh. I to the Burke Declaration), the VPAAC
3 recommended adoption of SMPTE-2052 as the standard caption-data encoding format for delivery
4 of captions to consumer video players. The FCC, however, has not yet decided whether it will
5 impose this standard on videos subject to the CVAA’s online closed captioning mandates. The
6 FCC must adopt and announce regulations implementing the CVAA and the schedule under which
7 the industry must come into compliance with them. The FCC is statutorily required to complete
8 this rulemaking process in just a few months – by January 13, 2012.

9 **III. SECTION 425.16 APPLIES TO PLAINTIFFS’ COMPLAINT BECAUSE IT ARISES**
10 **FROM CNN’S CONSTITUTIONALLY PROTECTED**
11 **FREE SPEECH ACTIVITIES.**

12 The California Anti-SLAPP statute broadly protects First Amendment speech activities,
13 including CNN’s expressive activities that Plaintiffs’ claims target, which are expressly protected
14 by C.C.P. § 425.16 (e)(4). A two-step process is followed to determine whether a cause of action
15 must be stricken under Section 425.16. *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002). “First, the
16 court decides whether the defendant has made a threshold showing that the challenged cause of
17 action is one arising from protected activity.” *Id.* To make this showing, the defendant must
18 demonstrate that the plaintiffs’ claim arises from actions by the defendant that “fit[] one of
19 the categories spelled out in section 425.16, subdivision (e).” *Id.* Under subdivision (e)(4),
20 the statute protects “any ... conduct [by the defendant] in furtherance of the exercise of the
21 constitutional right ... of free speech in connection with ... an issue of public interest.” Second,
22 if the defendant makes this threshold showing, the burden shifts to the plaintiff to establish, with
23 admissible evidence, “a probability that [he] will prevail on the claim[s].” C.C.P. § 425.16(b)(1).
24 If the plaintiff cannot meet that burden, its claims must be dismissed with prejudice. *Id.*

25 Both the Ninth Circuit Court of Appeals and this Court have recognized that a defendant
26 may file an anti-SLAPP motion to strike state law claims filed in federal court. *Hilton v. Hallmark*
27 *Cards*, 599 F.3d 894, 900 n.2 (9th Cir. 2010); *Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir.

1 2003).² CNN’s publishing of news videos on CNN.com comfortably falls within the scope of
 2 the anti-SLAPP statute under Section 425.16(e)(4), which encompasses any statement made “in
 3 connection with ... an issue of public interest,” which language courts have interpreted broadly.
 4 *See Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 481 (2000) (“The definition of
 5 ‘public interest’ within the meaning of [Section 425.16] has been broadly construed to include not
 6 only governmental matters, but also private conduct that impacts a broad segment of society.”).

7 Given this broad construction, Plaintiffs’ claims indisputably arise from CNN’s publishing
 8 of online news videos that feature its reporting on important news events happening around the
 9 world that involve matters of substantial public interest. *See, e.g., Philadelphia Newspapers, Inc. v.*
 10 *Hepps*, 475 U.S. 767, 775-76 (1986) (equating newspaper publishing with “free speech”); *Gates v.*
 11 *Discovery Commc’ns*, 34 Cal. 4th 679, 686 (2004) (applying constitutional protection enjoyed by
 12 “firsthand coverage of [] events,” documentaries and reenactments, in holding that “guarantees
 13 of freedom of expression apply” to news reports as well as entertainment) (internal quotation marks
 14 and citations omitted); *Forsher v. Bugliosi*, 26 Cal. 3d 792, 809 (1980) (acknowledging the
 15 “significant public interest” in news reports about crimes); *Braun*, 52 Cal. App. 4th at 1046 (“news
 16 reporting activity *is* free speech”); Cal. Const. art. I, § 2 (“Every person may freely speak, write and
 17 publish his or her sentiments on all subjects.”). Courts consistently have recognized that news
 18 reporting and publishing activities involve the exercise of free speech or acts in furtherance of free
 19 speech, and as such are protected under the anti-SLAPP statute. *See, e.g., Lieberman v. KCOP*
 20 *Television*, 110 Cal. App. 4th 156, 166 (2003) (“conduct” within the meaning of the anti-SLAPP
 21 statute “is not limited to the exercise of [the] right of free speech, but to all conduct in furtherance
 22 of the exercise of the right of free speech.”).

23
 24 _____
 25 ² The anti-SLAPP statute applies to state claims filed in federal diversity cases because it confers
 26 substantive rights and does not “directly collide” with the Federal Rules of Civil Procedure. *See,*
 27 *e.g., United States ex. rel Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-73 (9th
 28 Cir. 1999); *see also Metabolife, Inc. v. Wornick*, 264 F.3d 839, 839-40 (9th Cir. 2001); *eCash*
Technologies, Inc. v. Guagliardo, 127 F. Supp. 2d 1069, 1074-75 (C.D. Cal. 2000).

1 Under these circumstances, CNN has satisfied its burden of demonstrating that Plaintiffs'
2 state law claims are subject to a Special Motion to Strike. Plaintiffs cannot, however, for the many
3 reasons explained below, satisfy their burden of establishing a probability of prevailing on the
4 claims set forth in their Complaint.

5 **IV. PLAINTIFFS CANNOT DEMONSTRATE A PROBABILITY**
6 **OF PREVAILING ON THEIR CLAIMS AGAINST CNN.**

7 Because CNN's news reporting and dissemination activities comfortably fall within the
8 scope of Section 425.16, the burden shifts to Plaintiffs to present admissible evidence that they
9 have a probability of succeeding on the merits of their lawsuit. C.C.P. § 425.16 (b)(1); *Macias v.*
10 *Hartwell*, 55 Cal. App. 4th 669, 675 (1997). To satisfy their burden under the SLAPP statute, it
11 is not sufficient that Plaintiffs' claims survive a demurrer, nor can they rely on bare allegations
12 in their pleading; instead, in opposition, they must provide "competent, *admissible* evidence" to
13 "establish evidentiary support for [their] claim." *Mindys Cosmetics v. Dakar*, 611 F.3d 590, 599
14 (9th Cir. 2010) (emphasis added; citations omitted); *Navellier v. Sletten*, 106 Cal. App. 4th 763,
15 775-76 (2003); *Equilon Enters. v. Consumer Cause*, 29 Cal. 4th 53, 67 (2002) (recognizing plaintiff
16 must provide the court with sufficient evidence, not theories in the complaint, to permit the court to
17 determine whether he can prevail).

18 In reviewing a special motion to strike, the court applies a summary judgment-like standard.
19 *Taus v. Loftus*, 40 Cal. 4th 684, 714 (2007). A plaintiff's claims must be "supported by a sufficient
20 *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plain-
21 tiff is credited." *Id.* at 713-14 (citation omitted). If the plaintiff fails to satisfy this evidentiary
22 burden, the court *must* strike the complaint. C.C.P. § 425.16(b)(1). Plaintiffs cannot meet this
23 burden, and, therefore, their Complaint must be dismissed with prejudice as a matter of law.

24 **A. Plaintiffs' Claims Are Preempted By Federal Law.**

25 Plaintiffs' Complaint must be dismissed because under the Supremacy Clause of the federal
26 Constitution their claims are preempted by the "Video Programming Accessibility" provisions of
27 Section 713 of the Federal Communications Act, codified at 47 U.S.C. § 613, as amended by the

1 CVAA. As a consequence, Plaintiffs cannot, as a matter of law, show they have a probability of
 2 succeeding on the merits of their Unruh Act and CDPA claims.

3 Under the Supremacy Clause, federal law represents the “supreme Law of the Land.” U.S.
 4 Constitution, Art. VI, cl. 2. Consequently, “state laws that conflict with federal law are ‘without
 5 effect.’” *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010) (quoting *Altria Group, Inc. v.*
 6 *Good*, 555 U.S. 70, 75 (2008)). Applying this constitutional directive, federal law can “preempt
 7 and displace state law” through express preemption, field preemption, and conflict preemption.
 8 *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003). In determining whether such state laws are
 9 preempted, the Ninth Circuit requires consideration of the following principles:

- 10 1. “When considering preemption, no matter which type, the purpose of Congress
 11 is the ultimate touchstone.”
- 12 2. Absent express language, courts “look to the goals and policies of the Act in
 13 determining whether it in fact pre-empts an action.”
- 14 3. The “ultimate task in any pre-emption case is to determine whether state
 15 regulation is consistent with the structure and purpose of the statute as a
 16 whole.”
- 17 4. There is a presumption against preemption, except that, “when the State
 18 regulates in an area where there has been a history of significant federal
 19 presence, the presumption usually does not apply.”

20 *Id.* at 1136 (internal quotation marks and citations omitted). Here, Plaintiffs’ Unruh Act and CDPA
 21 claims are preempted under both “field” and “conflict” preemption.

22 Field preemption occurs “when Congress ‘so thoroughly occupies a legislative field,’ that
 23 it effectively leaves no room for states to regulate conduct in that field.” *Whistler Invs., Inc. v. De-*
 24 *pository Trust & Clearing Corp.*, 539 F.3d 1159, 1164 (9th Cir. 2008) (citing *Cipollone v. Liggett*
 25 *Group, Inc.*, 505 U.S. 504, 516 (1992)). *See also Silvas v. E*Trade Mortgage Corp.*, 514 F.3d
 26 1001, 1004 (9th Cir. 2008) (“mere volume and complexity of federal regulations demonstrate ...
 27 an implicit congressional intent to displace all state law”); *Ting*, 319 F.3d at 1136 (same); *Foley*
 28 *v. JetBlue Airways Corp.*, 2011 WL 3359730, at *12-13 (N.D. Cal. Aug. 3, 2011). *Cf.*, *Bennett v.*
T-Mobile USA, Inc., 597 F. Supp. 2d 1050, 1052 (C.D. Cal. 2008) (“Given the strong federal pre-
 presence of regulation in this industry, a presumption against preemption is unwarranted.”). Where

1 field preemption applies, the court must dismiss any and all state claims encompassed by the field.
2 *See, e.g., Silvas*, 514 F.3d at 1008; *E&J Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1041 (9th
3 Cir. 2007); *Public Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 649 (9th Cir. 2004).

4 It is plain that, in passing the Telecommunications Act of 1996, which significantly updated
5 the Federal Communications Act by, among other things, adding Section 713, Congress intended,
6 as to that section and its later CVAA amendments, to “occupy the entire field” of closed captioning.
7 Perhaps most prominently for present purposes, the soon-forthcoming FCC rules that will govern
8 closed captioning of online video are required under the CVAA amendments to Section 713, *see*
9 47 U.S.C. § 613(c)(2), and Section 713 expressly bars private rights of action and gives exclusive
10 jurisdiction to the FCC – including over IP video. *Id.* § 613(j) (prohibiting private rights of action
11 as to matters governed by “this section” 713). This provision disallows Plaintiffs’ claims, a conse-
12 quence that cannot be avoided by pleading under California’s disabilities laws rather than FCC
13 rules. *See Zulauf v. Kentucky Educ. Television*, 28 F. Supp. 2d 1022, 1023 (E.D. Ky. 1998), dis-
14 cussed in greater detail *infra* at 16-17. Section 713’s bar to private causes of action is compelling
15 evidence of Congress’ intent to preempt the field, as courts have recognized that such grants of
16 exclusive jurisdiction, coupled with a long history of federal regulation, warrant preemption.³

17 This preemptive effect is especially clear as to the instant suit, given that the CVAA
18 specifically directed the VPAAC, a special FCC committee, to identify uniform standards for
19 online closed captioning by recommending “protocols, technical capabilities, and technical
20 procedures,” as well as any “technical standards,” necessary to permit industry players to deliver
21

22 _____
23 ³ *E.g., Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 320-21 (2d Cir. 2000) (federal
24 Communications Act “make[s] clear that Congress intended the FCC to [have] exclusive authority
25 over technical matters related to radio broadcasting,” and legislative history was consistent with
26 “inference of preemption from Congress’s comprehensive legislation in the field and [its] explicit
27 delegation of authority”); *SMSA Ltd. P’ship v. Town of Clarkstown*, 603 F. Supp. 2d 715, 722-23
28 (S.D.N.Y. 2009); *Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power*, 384 F.3d 756,
761 (9th Cir. 2004). *Cf., Bennett v. T-Mobile USA, Inc.*, 597 F. Supp. 2d 1050, 1052 (C.D. Cal.
2008) (“Given the strong federal presence of regulation in this industry, a presumption against
preemption is unwarranted”).

1 online closed captioning.⁴ In carrying out this charge, the VPAAC appreciated the need for uni-
 2 form standards to avoid unnecessary costs and delays. *See* VPAAC Report (attached as Exhibit I),
 3 at 27 (“[I]t is highly desirable that there be a single standard interchange format for content
 4 providers to encode closed captions into programming before they distribute it With this single
 5 standard, content providers can caption video for the Internet one time. Otherwise, they might have
 6 to recaption Internet video, incurring additional cost and delay.”). *See also* Declaration of Clyde D.
 7 Smith (“Smith Declaration”) ¶ 20. *Compare, e.g., JetBlue*, 2011 WL 3359730, at *13-15 (dismiss-
 8 ing as field-preempted Unruh and CDPA claims based on alleged inaccessibility of airline website
 9 and check-in kiosks, which were “pervasively regulated” by “detailed, comprehensive, national
 10 regulation, based on Federal statute” as “part of a broad, complex regulatory scheme” that included
 11 “rules [that] provide specific steps to be taken” as to airline websites and kiosks).

12 It is further notable that, unlike the ADA, which allows states to adopt remedies, rights,
 13 and procedures offering greater protection for those with disabilities than the ADA affords, *see*
 14 42 U.S.C. § 12201(b), neither Section 713, nor any other relevant provision of the Federal Com-
 15 munications Act, provides such a “savings clause.” While the presence of a savings clause that
 16 preserves states’ rights tends to preclude federal preemption, the converse also is true – the
 17 absence of such a savings clause, as is the case with Section 713, underscores the intended
 18 federal supremacy and the absence of state power to establish closed captioning requirements.⁵

19 _____
 20 ⁴ *See generally* CVAA § 201(e)(1) (47 U.S.C. note). Even before enactment of the CVAA, the
 21 FCC recognized the need for the federal government to establish and pursue uniform standards for
 22 making video programming accessible to Americans with disabilities. *See* Connecting America:
 23 The National Broadband Plan (attached as Exhibit J to Burke Declaration), at 181 (“In order to
 achieve this goal [to allow Americans with disabilities to experience the benefits of broadband], the
 federal government must become a model for accessibility.”); *id.* at 182 (“The federal government
 should ensure the accessibility of digital content.”).

24 ⁵ *See, e.g., Qwest Corp. v. Arizona Corp. Comm’n*, 567 F.3d 1109, 1118 (9th Cir. 2009) (preempt-
 25 ing state law because, “[p]erhaps most tellingly, [the relevant Telecom Act provision] contains no
 26 [] state commission authority savings clause”) (quoting *Verizon New England, Inc. v. Maine Pub.*
 27 *Utils. Comm’n*, 509 F.3d 1, 7 (1st Cir. 2007) (absence of clause reserving state power, “under-
 score[es] intended federal supremacy and the absence of state power”)); *E&J Gallo*, 503 F.3d
 at 1041.

1 Plaintiffs' Complaint also must be dismissed under the doctrine of conflict preemption
2 because, if this Court orders closed captioning on all news videos published on CNN.com, such
3 application of California law would directly conflict with the federal policy of uniform closed
4 captioning standards. Conflict preemption occurs when "federal law actually conflicts with any
5 state law." This requires examination of the federal statute "as a whole to determine whether
6 a party's compliance with both federal and state requirements is [1] impossible or [2] whether,
7 in light of the federal statute's purpose and intended effects, state law poses an obstacle to
8 the accomplishment of Congress's objectives." *Whistler*, 539 F.3d at 1164 (citing *Crosby v.*
9 *National Foreign Trade Council*, 530 U.S. 363, 373 (2000)). *See also Ting*, 319 F.3d at 1136.

10 Here, the purpose of Section 713, as recognized by a federal court specifically interpreting
11 federal closed captioning law and rules, is to "promote uniformity in the area of closed captioning."
12 *Zulauf*, 28 F. Supp. 2d at 1023 (court was "merely honoring Congress's intent to allow the FCC to
13 address any [closed captioning] complaints under the statute."). Later, the CVAA was created to
14 promote uniformity specifically in the area of closed captioning on the Internet. *See S. Rep. No.*
15 *111-386*, at 1 (2010) (attached as Exhibit H to the Burke Declaration) ("The purpose of [the
16 CVAA] is to update the communications laws to help ensure that individuals with disabilities are
17 able to ... better access video programming."). In doing so, the CVAA specifically directs the FCC
18 and its advisory committees to determine the appropriate technical standards and implementation
19 schedule for the provision of online closed captioning. Congress could hardly be more explicit in
20 articulating how it intended to effectuate its objective of uniform closed captioning standards.

21 Compliance with both an interpretation of California's Unruh Act and the CDPA that
22 requires immediate captioning under an as-yet undefined technical standard, and with federal law
23 embodied by the CVAA, is impossible. There currently exists no technical capacity for CNN to
24 create a California-only solution. Rather, CNN.com enjoys a national and international audience.
25 Nothing in its operations specifically targets only a California audience. Even if it were technically
26 possible to create captioned news videos available only to hearing-impaired Californians, it is
27 neither economically nor practically feasible to have differing standards for video captioning in

1 different states – or for only one state. Declaration of Michael Toppo (“Toppo Declaration”)
2 ¶¶ 8-11, 16.

3 The present lack of industry consensus for closed-captioning online video also makes it
4 impossible for CNN to provide the relief that Plaintiffs seek here. The divergent proprietary
5 standards, varying software and equipment, and other non-standardized technical impediments
6 currently preclude the levels of captioning accuracy required for CNN’s constitutionally-protected
7 news activities. As described in greater detail in the Smith Declaration, forcing CNN.com to use
8 the present error-prone mechanisms would be improper. Smith Decl. ¶¶ 15-17, 23. Rather, the
9 correct manner of proceeding is the one already underway, *i.e.*, development of federal regulations
10 that can be relied upon industry-wide to ensure accurate and widely available captions. CNN
11 cannot accomplish this on its own – or be forced to – but rather, as with closed captioning for tele-
12 vision, uniform rules are needed not only for content-providers, but also software and hardware
13 manufacturers. *Cf., id.* ¶¶ 14, 16-19. Plaintiffs’ needs cannot be met by jumping the gun on the
14 FCC regulatory process, and forcing CNN.com to do so would impermissibly conflict with the
15 federal CVAA/FCC regulatory regime.

16 When the FCC establishes a schedule for compliance with captioning requirements for
17 online video, and if, as expected, it requires such obligations in phases, *see* VPAAC Report § VII,
18 there would also be a direct conflict between application of California law for Plaintiffs to require
19 CNN to implement immediate captioning, while the FCC imposes a phased process. This would
20 further place CNN in an impossible position of having to comply with conflicting state and federal
21 requirements. *See, e.g.*, CVAA § 202(b) (Exhibit G) (requiring regulations to adopt an “appropriate
22 schedule of deadlines for the provision of closed captioning”); S. Rep. No. 111-386, at 14 (attached
23 as Exhibit H to the Burke Declaration) (“The Committee elected to apply the captioning require-
24 ment only prospectively”).

25 Under the “obstruction” strand of conflict preemption, such “an aberrant or hostile state rule
26 is preempted to the extent it actually interferes with the methods by which the federal statute was
27 designed to reach [its] goal.” *Ting*, 319 F.3d at 1137 (internal quotation marks omitted). Courts

1 “consider the relationship between state and federal laws as they are interpreted and applied, not
2 merely as they are written,” focusing on “both the objective of the federal law and the method
3 chosen by Congress to effectuate that objective, taking into account the law’s text, application,
4 history, and interpretation.” *Id.* In *Bennett*, the court found the plaintiff’s state common law claims
5 regarding injury due to radio emissions were conflict preempted as it was Congress’ intent to create
6 national uniformity in wireless telecommunications. 597 F. Supp. 2d at 1053. It specifically
7 acknowledged that, just as here, Congress delegated authority to the FCC “to create uniform rules
8 for telecommunications, which, by its very nature, requires consistency amongst the states,” and
9 that the “essential objective in creating wireless policy is to achieve nationwide compatibility.” *Id.*
10 It cautioned that, “[t]o allow state claims such as these asserted by Plaintiff to proceed would be to
11 question the judgment of the FCC on the issue” and “interfere with the goal of national uniformity
12 in telecommunications.” *Id.*

13 The same reasoning applies here. To require CNN only to provide closed captions on all
14 news videos posted on CNN.com under California law would effectively circumvent the federal
15 objective in establishing uniform standards for closed captioning on all video programming, and the
16 time-table on which they will apply. It therefore makes sense in this context, as discussed at length
17 above, that Section 713 expressly prohibits private rights of action. *See* 47 U.S.C. § 613(j). *See*
18 *supra* at 10; *see also infra* at 17.

19 The unique concerns the Internet raises regarding state and federal jurisdictional authority
20 also supports the need for uniform *federal* standards. In one oft-cited case, *American Libraries*
21 *Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), the Internet is described as a “decentralized,
22 global communications medium” whose “unique nature ... highlights the likelihood that a single
23 actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by
24 states that the actor never intended to reach and possibly was unaware were being accessed.” *Id.* at
25 164, 168. *See also id.* at 169 (noting that “geography [] is a virtually meaningless construct on the
26 Internet”). Other courts have relied on *Pataki* to invalidate state laws governing activities on the
27

1 Internet.⁶ The logic of these cases applies with dual force here, where not only does the unbounded
 2 nature of the Internet make closed captioning mandates imposed under California-specific law
 3 unsupportable, the CVAA's targeting of online video for federally established captioning standards
 4 underscores the need for preemption.

5 **B. The FCC's Exclusive Jurisdiction Over Closed Captioning Precludes This Court From**
 6 **Granting Plaintiffs' Requests For Relief.**

7 Plaintiffs' Complaint must also be dismissed because Congress expressly gave the FCC
 8 exclusive jurisdiction over closed captioning matters, leaving this Court without subject matter
 9 jurisdiction to hear Plaintiff's claims. *See, e.g., United States v. Michigan Nat'l Corp.*, 419 U.S.
 10 1, 5 n.2 (1974) (“[W]here the administrative agency has exclusive jurisdiction to consider the
 11 complaint initially brought in court” it “must of course dismiss the action.”). *Cf., Capital Serv.,*
 12 *Inc. v. NLRB*, 347 U.S. 501, 504-05 (1954) (“[W]here Congress ... has vested a federal agency with
 13 exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of
 14 functions,” proceedings may be enjoined “to preserve the federal right.”). Section 713 specifically
 15 charged the FCC with “ascertain[ing] the level at which video programming is closed captioned,”
 16 and directed it to “prescribe such regulations as are necessary.” *See* 47 U.S.C. §§ 613(a), (b)(1).
 17 Section 713 also directed the FCC to establish “an appropriate schedule of deadlines for the pro-
 18 vision of closed captioning of video programming,” and authorized the FCC to exempt certain
 19 providers and programs based on a determination of undue burden, which included consideration
 20 of the nature and cost of closed captioning, the impact on the operation of the provider or program-
 21 mer, and the financial resources of the provider or programmer. *See id.* §§ 613(c)-(e).

22 More recently, Congress recognized that viewers are increasingly consuming video over
 23 distribution channels using Internet protocol (“IP”), including videos on websites, and enacted the

24 _____
 25 ⁶ *See American Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003) (invalidating state law
 26 outlawing distribution of material harmful to minors because non-state residents who post to web
 27 would be subject to prosecution in state); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004);
 28 *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Center for Democracy & Tech. v. Pappart*, 337
 F. Supp. 2d 606 (E.D. Pa. 2004).

1 CVAA. Among other things, it amended Section 713 to direct the FCC to update and extend its
 2 captioning rules to address IP videos, including those on websites like CNN.com, that previously
 3 appeared on television with captions. CVAA § 202(b) (amending 47 U.S.C. § 613(c)(2)(A)). As
 4 with the original captioning authorization, the CVAA requires the FCC to set a schedule of dead-
 5 lines for captioning online video, and authorizes it to exempt any service, program or equipment if
 6 compliance would be economically burdensome. *Id.* (amending 47 U.S.C. §§ 613(c)(1), (c)(2)(C)
 7 and (c)(2)(D)). *The FCC must issue its revised rules by January 13, 2012.*⁷

8 The federal law's plain language reflects Congress' intent to vest the FCC with exclusive
 9 jurisdiction over closed captioning matters, including the extent to which Section 713 plainly states:
 10 "The [FCC] shall have exclusive jurisdiction with respect to any complaint under [Section 713]."
 11 47 U.S.C. § 613(j) ("Nothing in this section shall be construed to authorize any private right of
 12 action to enforce any requirement of this section or any regulation thereunder."). *See also* 47
 13 C.F.R. § 79.1(h) (same). In addition, no other body is authorized to set binding closed captioning
 14 standards, or to enforce compliance. Even insofar as the ADA makes captioning an auxiliary aid in
 15 some contexts, *see, e.g.*, 42 U.S.C. § 12103(1)(A)-(B); 28 C.F.R. § 36.303(b)(1)-(2), when it comes
 16 to video programming, the FCC alone regulates closed captioning. *See, e.g., Zulauf*, 28 F. Supp. 2d
 17 at 1023. Plainly, the FCC exclusively holds responsibility for closed captioning standards,
 18 including those at issue in this litigation.⁸

19
 20 ⁷ As noted above, the recently issued VPAAC Report includes recommendations for rules govern-
 21 ing the captioning of online video. *See* Exh. I to Burke Declaration. The VPAAC Report's July
 22 13, 2011 issue date establishes January 13, 2012, as the date by which the FCC must adopt rules
 23 governing the captioning of IP video covered by the CVAA and proposes the deadline(s) by
 which those disseminating them must comply. *See* CVAA § 202(b) (requiring issuance of FCC
 regulations no later than six months after issuance of VPAAC Report).

24 ⁸ That the FCC has not yet issued rules to implement the IP video captioning requirements of the
 25 CVAA is irrelevant. The nexus between the Telecommunications Act and CVAA shows that, with
 26 passage of the CVAA, Congress intended to preserve uniform regulation of captioning by maintain-
 27 ing the FCC's exclusive jurisdiction over closed captioning of Internet videos. As noted, the 1996
 Act (for traditional programming) and CVAA (for online videos) both require the FCC to establish
 28 regulations for closed captioning, develop compliance deadlines, and determine how and when
 exemptions should apply. Such a comprehensive regulatory scheme for closed captioning, both

1 The prohibition in Section 713 that expressly bars private causes of action like Plaintiffs'
 2 claims here also further emphasize the FCC's exclusive role, an express directive that federal
 3 courts, as well as the FCC itself, recognize. In *Zulauf*, a federal district court dismissed a complaint
 4 asking it to require the defendant to provide closed captioning on all broadcasts, because the court
 5 found it lacked subject matter jurisdiction. Although plaintiff filed claims under the ADA (and
 6 federal Rehabilitation Act, 29 U.S.C. § 794) without mention of Section 713, the court nevertheless
 7 acknowledged that, "in order to determine whether [defendant] has to provide closed captioning,"
 8 the court "would have to interpret [Section 713] and the FCC's implementing regulations." *Id.* at
 9 1023. Noting that Section 713 was "the latest and most specific statute addressing a broadcaster's
 10 duty to provide closed captioning for its video programming," the court held that:

11 Congress's intent in giving the FCC exclusive jurisdiction over any
 12 [Section 713] complaints ... was to promote uniformity in the area of
 13 closed captioning [T]he FCC has expertise in the area ... and has
 14 already taken steps to determine how much closed captioning broad-
 15 casters can reasonably provide. It would be inefficient and a waste
 16 of judicial resources for the Court to try and reinvent the wheel and
 17 determine the proper rate at which broadcasters should be providing
 18 closed captioning for their programming.

19 *Id.* at 1023-24. *See also Johnson v. Hairston*, 2007 WL 748479 (M.D Ala. Mar. 8, 2007) (dismiss-
 20 ing for lack of subject matter jurisdiction as FCC's captioning regulations provided administrative
 21 remedies that must be followed with regard to complaints, private rights of action are prohibited,
 22 and exclusive jurisdiction lies with the FCC with respect to closed captioning complaints); *Closed*
 23 *Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd. 3272,
 24 ¶ 27 (1997) ("Both Section 713 and the legislative history indicate that Congress intended to give
 25 us sufficient jurisdiction to ensure the accessibility of video programming.").

26 Even if the Court does not find dismissal warranted on grounds of the FCC's exclusive
 27 jurisdiction over closed captioning, it should, at the very least, suspend this proceeding and refer
 28 to the FCC the closed captioning issues raised here under the doctrine of primary jurisdiction.

online and off, demonstrates that Congress intended the FCC to have exclusive jurisdiction over
 closed captioning matters generally.

1 Primary jurisdiction depends on “the extent to which Congress, in enacting a regulatory scheme,
 2 intends an administrative body to have the first word on issues arising in judicial proceedings.”
 3 *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987) (citing *United v.*
 4 *RCA*, 358 U.S. 334, 339 (1959)). The Ninth Circuit has identified four factors that are “uniformly
 5 present” in cases where primary jurisdiction is properly invoked: (1) the need to resolve an issue
 6 that (2) has been placed by Congress within the jurisdiction of an administrative body having
 7 regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive
 8 regulatory scheme [which] (4) requires expertise or uniformity in administration.” *Id.* When
 9 primary jurisdiction is found, courts generally have discretion whether to stay or dismiss without
 10 prejudice.⁹

11 At a minimum, referral to the FCC of the closed captioning issues raised here is warranted,
 12 under the *General Dynamics* factors: (1) closed captioning issues must be resolved (2) by the FCC,
 13 to whom Congress granted expansive closed captioning rulemaking and enforcement authority,
 14 thereby (3) subjecting an industry (*e.g.*, video programmers and distributors) and an activity
 15 (dissemination of online video) to a comprehensive regulatory scheme that (4) requires the FCC’s
 16 expertise and uniformity in the administration of rules and regulations. Furthermore, the absence
 17 of state or federal rules for Internet-video closed captioning means this issue is one of first
 18 impression, which underscores the efficacy of referral to the FCC. *See, e.g., Lyon v. Gila River*
 19 *Indian Cmty.*, 626 F.3d 1059, 1075 (9th Cir. 2010). As the Ninth Circuit has held, “the primary
 20 jurisdiction doctrine ... should be used if a claim requires resolution of an issue of first impression,
 21 or of a particularly complicated issue that Congress has committed to a regulatory agency, and if
 22 protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which
 23

24 ⁹ *See, e.g., Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1091 (9th Cir. 2006) (“Whether
 25 to stay or dismiss without prejudice [under] primary jurisdiction is a decision within the discretion
 26 of the district court.”); *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008); *cf.*,
 27 *Davel*, 460 F.3d at 1091 (noting courts may dismiss “if the parties would not be unfairly disad-
 28 vantaged,” *e.g.*, where there is no “risk that the statute of limitations may run ... pending agency
 resolution”).

1 administers the scheme.” *Id.* (internal quotation marks and citation omitted). Such is clearly the
 2 case here.

3 **C. Plaintiffs’ Complaint Poses An Unconstitutional Prior Restraint And Regulates**
 4 **CNN.com’s Speech In Violation Of The First Amendment And California Law.**

5 Plaintiffs ask this Court to order CNN – and CNN *alone* – to include real-time closed
 6 captioning of all news videos hosted on CNN.com, which is among the world’s most frequently
 7 visited news websites. Toppo Decl. ¶ 2,11. The injunctive relief requested by Plaintiffs will
 8 uniquely prohibit CNN from disseminating news videos on CNN.com about breaking news events
 9 unless they are closed-captioned, using an as-yet unspecified and untested captioning process to
 10 be dictated by Plaintiffs. None of CNN’s news competitors will be burdened by this requirement.
 11 Because such an order would “freeze,” not just chill, CNN’s exercise of its First Amendment rights,
 12 *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976), it qualifies as a “classic example[] of
 13 [a] prior restraint[].” *Alexander v. United States*, 509 U.S. 544, 549 (1993).

14 As the United States Supreme Court has made clear, “prior restraints on speech ... are the
 15 most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press*
 16 *Ass’n*, 427 U.S. at 559. Permitting the judicial branch to restrain publication of information by the
 17 press would undermine the “main purpose” of the First Amendment, which is “to prevent all such
 18 previous restraints upon publications as had been practiced by other governments.” *Id.* at 557.
 19 Accordingly, any effort to restrain publication bears an extremely “heavy presumption against its
 20 constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per
 21 curiam). “[T]his ‘most extraordinary remedy’” may be considered “only where the evil that
 22 would result from the reportage is both great and certain and cannot be militated by less intrusive
 23 measures.” *CBS v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers). Such orders
 24 should be granted only in “exceptional cases.” *Near v. Minnesota*, 283 U.S. 697, 716 (1931).¹⁰

25 ¹⁰ California courts have also universally rejected prior restraints. Indeed, because the guarantee
 26 of free speech and press found in article I, section 2(a) of the California Constitution “is more
 27 definitive and inclusive than the First Amendment,” the burden on a party seeking a prior restraint
 28 in this state is even more onerous, and potentially insurmountable. *In re Marriage of Candiotti*, 34
 Cal. App. 4th 718, 724 (1995). For well over a century, California courts have relied on this state

1 That the restraint imposed on CNN may only be temporary is of no moment. *Nebraska*
 2 *Press Ass'n*, 427 U.S. at 559 (“[T]he burden on the Government [to justify prior restraints] is not
 3 reduced by the temporary nature of a restraint A prior restraint ... has an immediate and irre-
 4 versible sanction.”); *id.* at 609 (Brennan, J., concurring). *See also Freedman v. Maryland*, 380 U.S.
 5 57, 59 (1965) (determination of validity of prior restraint “must [] be limited to ... the shortest
 6 fixed period compatible with sound judicial resolution”); *CBS v. District Court*, 729 F.2d 1174,
 7 1177 (9th Cir. 1983) (“The first amendment informs us that the damage resulting from a prior
 8 restraint – even a prior restraint of the shortest duration – is extraordinarily grave.”). This is
 9 particularly true where, as here, millions of viewers regularly rely on CNN.com to learn about
 10 breaking news events occurring throughout the world.¹¹

11 Applying the Unruh Act and the CDPA to CNN.com in such manner also would be “a
 12 restriction on the content of protected speech [that] is invalid unless [Plaintiffs] can demonstrate []
 13 it passes strict scrutiny – that is, unless it is justified by a compelling government interest [that it]
 14 is narrowly drawn to serve,” a standard that “[i]t is rare [for] a regulation” to survive.” *Brown v.*
 15 *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). Plaintiffs’ proposed injunction could
 16 also be viewed as an order barring CNN.com from posting online video without captions, *see, e.g.*,
 17 Compl. ¶ 65, but that only makes matters worse (if that is possible). As the Supreme Court recently

18 _____
 19 guarantee (*see Dailey v. Superior Court*, 112 Cal. 94, 97 (1896), as well as the First Amendment, in
 20 rejecting prior restraints, which the California Supreme Court has denounced as “the most severe
 21 method of intellectual suppression known in modern times.” *Flack v. Municipal Court*, 66 Cal. 2d
 22 981, 988 n.5 (1967). As these cases demonstrate, there are no interests present here that conceiv-
 23 ably could warrant the prior restraint Plaintiffs seek to impose on CNN. Even in Unruh Act cases,
 24 California courts have avoided applying the Act to prohibit speakers from speaking unless they
 25 comply with it as an impermissible prior restraint. *See, e.g., Ingels v. Westwood One Broad. Servs.,*
 26 *Inc.*, 129 Cal. App. 4th 1050, 1060 (2005) (applying § 425.16 anti-SLAPP provision). *Cf., Long v.*
 27 *Valentino*, 216 Cal. App. 3d 1287 (1989) (even if the “First Amendment does not shield a speaker
 28 who uses words [] to violate the Unruh Act, [] the speech itself may not be the object of prior
 restraint”).

11 There can be little doubt that “delay inherent[ly] ... could itself destroy the contemporary news
 12 value of [] information the press seeks to disseminate.” *Nebraska Press Ass'n*, 427 U.S. at 609
 13 (Brennan, J., concurring); *see Smith Decl.* ¶¶ 13, 23 (anticipated delays caused by closed cap-
 14 tioning).

1 reaffirmed, these are merely two sides of the same coin, in that “the ‘distinction between laws
2 burdening and laws banning speech is but a matter of degree,” *Sorrell v. IMS Health, Inc.*, 131
3 S. Ct. 2653, 2664 (2011) (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 812
4 (2000)), and again, viewing the relief sought as a ban on CNN posting news video to CNN.com
5 unless captioned would be an unlawful prior restraint carrying a heavy presumption of invalidity.
6 *E.g., Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1023 (9th Cir. 2009).

7 Judicially compelling CNN to add captions to all news videos hosted on CNN.com ahead
8 of federal requirements will compel CNN to speak in ways it otherwise would not, in violation of
9 the First Amendment. Even given the Unruh Act’s statutory objectives, California law recognizes
10 that it cannot impose obligations to speak, or that alter a speaker’s message, in the name of non-
11 discrimination. *See, e.g., Ingels*, 129 Cal. App. 4th 1050. *Ingels* held that the plaintiff was unlikely
12 to prevail on his Unruh Act age-discrimination claim based on a radio show not allowing him to
13 participate given the age discrepancy between him and the show’s topic/target-audience, noting that
14 Defendants’ “choice of which callers to allow on the air is part of the content of speech.” *Id.* at
15 1074. Such intrusion into broadcasters’ “First Amendment right to control the content of their
16 program” was not required by the Act. *Id.* There is nothing about the CDPA that would compel
17 a different conclusion as far as that law is concerned. Other California cases similarly indicate that,
18 when First Amendment rights are implicated by applying the Unruh Act, countervailing interests
19 require additional scrutiny.¹²

20 Even under a less stringent “intermediate scrutiny” test, which is the minimum that would
21 apply, *see, e.g., Ingels*, 129 Cal. App. 4th at 1074, interpreting the Unruh Act and the CDPA to
22 force CNN to prematurely caption its online news videos using current error-laden technology
23 would fail constitutional review, because it would not sufficiently advance a government interest

24
25 ¹² *See, e.g., Ingels*, 129 Cal. App. 4th at 1072 (citing *Hart v. Cult-Awareness Network*, 13 Cal.
26 App. 4th, 777, 790-93 (1993) (application of Unruh Act to require defendants to accept plaintiffs as
27 members would “place a heavy burden on [the] constitutionally protected freedom of association,”
which no compelling interest in preventing, *e.g.*, religious discrimination, supported infringing)).

1 (even if it is arguably important), and would burden more speech than necessary. *Turner Broad.*
2 *Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994). While there is no dispute that helping ensure the deaf
3 and hearing impaired fully and equally enjoy audiovisual content online is a worthy objective, it is
4 far less obvious that compelling CNN to caption its news videos before federal regulations are
5 announced in January 2012 will substantially advance that interest. CNN competes with local and
6 national news outlets for its audience, and only CNN will be subject to this Court's captioning
7 order, which places an unfair and undue burden on CNN.com as a news outlet. Furthermore, given
8 the errors and resulting inaccuracies that current, non-standardized technology can introduce (Smith
9 Decl. ¶ 15-17, 23), CNN.com has a First Amendment right not to have its speech muddled or
10 perceived as negligently presented, in such manner as the relief sought here would require.

11 Little also would be gained by impermissibly regulating CNN's speech, while all await
12 the FCC regulations. Even now, the vast majority of news videos available on CNN.com already
13 appear alongside accompanying textual information that track that audio portion of the video.
14 Toppo Decl. ¶ 19; *see also* Compl. ¶¶ 9, 12. Compelling CNN to provide closed captioning would
15 impose a burden on CNN alone that will only incrementally advance interests underlying the Unruh
16 Act or the CDPA. While Plaintiffs may prefer real time closed captioning to reading the text of
17 new stories currently available on CNN.com, judicially compelling this result will accomplish
18 relatively little and come with an impermissible cost. Because the FCC will issue regulations under
19 the CVAA by mid-January, governing how and when captioning must be provided for online
20 videos such as those at issue here, any government interest advanced by applying the Unruh Act
21 and the CDPA as Plaintiffs demand would convey benefits limited to the interval between the time
22 such relief is ordered and the time CVAA regulations require closed captioning. This inherently
23 ephemeral nature of the relief sought is not a sufficient basis to interfere with CNN's
24 constitutionally-protected rights.¹³

25 _____
26 ¹³ This is certainly not to minimize the value to the deaf and hearing impaired of having an im-
27 proved viewing experience even during this short time, but rather, given the unprecedented prior
28 restraint that will be imposed on CNN's speech, it is offered to place in context the substantial
burden that Unruh Act and CDPA compelled video captioning would uniquely place on CNN.

1 Regardless how much online video would be rendered more accessible by mandating
2 addition of captions on news videos hosted on CNN.com, doing so also would burden far more
3 speech than is constitutionally permissible, because CNN would suffer substantial economic
4 burdens from the compelled captioning Plaintiffs seek. As explained in the Smith Declaration,
5 adding captions to online video (even video that was previously shown on TV with closed
6 captions), requires different coding and technical steps, industry-wide consensus standards for
7 which are still being developed. Smith Decl. ¶¶ 14-21. Until such standards are universally
8 adopted, explained, and incorporated into FCC regulations, CNN will be, at most, able only to
9 make its “best guess” what those standards ultimately will entail. *Id.* ¶ 23-24.

10 CNN also would be required to take on an added production expense that its competitors are
11 able to avoid, or at least delay until the CVAA compels such investment by federal law, and would
12 be required to do so without uniform standards. CNN will be at a distinct disadvantage vis-à-vis
13 other entities engaged in the same type of speech. This economic impact must be accounted for
14 elsewhere in CNN’s operations and, along with the delay interposed in the posting of online news
15 videos so CNN.com can caption them (while its competitors escape having to do so pre-CVAA
16 rules), the consequence would likely be CNN.com posting fewer news videos, or delaying their
17 posting. As a result, revenues which fund reporting and dissemination of news would be adversely
18 affected. Toppo Decl. ¶¶ 14, 17-18.

19 It is also unlikely CNN will be unable to predict what standards the FCC will adopt
20 under the CVAA for captioning online video, and/or that the FCC proceeding will take unexpected
21 turns or require unanticipated industry-wide compromises. In that case, if CNN is compelled to
22 implement technical measures that *differ* from the regulatory requirements that the FCC ultimately
23 adopts, because this Court will have ordered CNN to do so in advance of the CVAA’s FCC-
24 specified compliance deadline, CNN will pay a double price because it will have to abandon its
25 substantial, legally-obsolete investment in non-FCC-compliant captioning technology. Toppo
26 Decl. ¶ 17; Smith Decl. ¶ 24. The proper approach, and that which the First Amendment requires, is
27 to allow CNN.com to remain a part of the industry-wide compliance with FCC regulations that will
28

1 set a level playing field for all online video news providers and ensure the online access desired by
2 Plaintiffs. Not only does this honor the supremacy of federal law, it avoids ordering CNN alone to
3 adopt technologically inferior measures that will alter its content, violating its protected
4 constitutional rights.

5 Under settled First Amendment and California law, and because of the substantial burdens
6 imposed by Plaintiffs' requested relief, the Court must reject Plaintiffs' claim that California law
7 requires CNN to add captioning to its online news videos. The injunctive relief that Plaintiffs'
8 request will impermissibly interfere with CNN's constitutionally-protected right to report on news
9 about matters in the public interest.¹⁴

10 **D. Plaintiffs Cannot Prevail Because The Requested Relief Would Violate The Dormant**
11 **Commerce Clause.**

12 Plaintiffs' Complaint also should be dismissed because California's Unruh Act and the
13 CDPA, if applied to the news videos hosted on CNN.com as Plaintiffs wish, would impermissibly
14 burden interstate commerce in violation of the dormant Commerce Clause. On its face, the federal
15 Constitution's Commerce Clause grants Congress affirmative authority to regulate interstate
16 commerce. Courts also consistently apply it to prohibit state actions that impede interstate
17 commerce, based on an inference, commonly referred to as the "dormant Commerce Clause," that
18 promotes national markets and the free flow of commerce between states by preventing
19 protectionist policies. *See, e.g., National Ass'n of Optometrists & Opticians LensCrafters, Inc. v.*
20 *Brown*, 567 F.3d 521, 523 (9th Cir. 2009).

21 In *Healy v. Beer Institute*, 491 U.S. 324 (1989), the U.S. Supreme Court outlined the
22 analytic framework for Commerce Clause analyses as follows:
23
24

25 ¹⁴ Construing the Unruh Act and the CDPA to deny Plaintiffs the compelled-speech relief they
26 seek is especially proper given the well-established obligation that courts construe such laws to
27 avoid constitutional tension. *E.g., Jones v. United States*, 529 U.S. 848, 857 (2000); *Edward J.*
DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

- 1 1. “First, the Commerce Clause precludes the application of a state statute to
2 commerce that takes place wholly outside of the State’s borders, whether or
3 not the commerce has effects within the State.” *Id.* at 336.
- 4 2. “Second, a statute that directly controls commerce occurring wholly outside the
5 boundaries of a State exceeds the inherent limits of the enacting State’s author-
6 ity and is invalid regardless of whether the statute’s extraterritorial reach was
7 intended by the legislature. The critical inquiry is whether the practical effect of
8 the regulation is to control conduct beyond the boundaries of the State.” *Id.*
- 9 3. “Third, the practical effect of the statute must be evaluated not only by con-
10 sidering the consequences of the statute itself, but also by considering how the
11 challenged statute may interact with the legitimate regulatory regimes of other
12 States and what effect would arise if not one, but many or every, State adopted
13 similar legislation. Generally speaking, the Commerce Clause protects against
14 inconsistent legislation arising from the projection of one state regulatory
15 regime into the jurisdiction of another State.” *Id.* at 336-37.

11 Under this rubric, where a state statute “directly regulates or discriminates against interstate com-
12 merce,” courts have “generally struck down the statute without further inquiry.” *Id.* at 337 n.14.

13 If, however, a state statute “has only indirect effects on interstate commerce and regulates evenhan-
14 dedly,” the court will “examine[] whether the State’s interest is legitimate and whether the burden
15 on interstate commerce clearly exceeds the local benefits.” *Id.* See also *Yakima Valley Mem.*
16 *Hosp. v. Washington State Dep’t of Health*, 2011 WL 3629895, at *7 (9th Cir. Aug. 19, 2011).

17 Plaintiffs’ demand to have this Court apply the Unruh Act and the CDPA to require closed
18 captioning on all news videos hosted on CNN.com “directly” impacts interstate commerce because
19 its practical effect is to regulate activities wholly outside the State. See *Gravquick A/S v. Trimble*
20 *Navigation Int’l, Ltd.*, 323 F.3d 1219, 1224 (9th Cir. 2003) (citing *Healy*). As a threshold issue,
21 applying these broad California laws to require CNN to provide real time captioning on all news
22 videos hosted on CNN.com would apply to commerce that takes place “wholly outside of the
23 State’s borders,” *i.e.*, CNN’s dissemination of news online from Atlanta and other non-California
24 locations, to an audience consisting – by a great preponderance – of non-Californians. *Healy*,
25 *supra*. As explained above, there is no feasible way for CNN.com to create one version of its
26 online videos with captioning solely for consumption by visitors in California, and another,
27 caption-less version for everyone outside the state. Applying the Unruh Act and the CDPA as

1 Plaintiffs insist will require captions that will be seen far beyond the California's borders – in
2 fact, they will be seen worldwide. *See supra* at 12-15.

3 While CNN.com's videos are accessible by Californians, and thus "ha[ve] effects within
4 the State," *Healy*, 491 U.S. at 336, the predominant impact of Plaintiffs' application of the Unruh
5 Act and the would extend to commerce occurring wholly *outside* California. *Cf., American Book-*
6 *sellers*, 342 F.3d at 96 ("Because the internet does not recognize geographic boundaries, it is dif-
7 ficult, if not impossible, for a state to regulate internet activities without projecting its legislation
8 into other States.") (internal quotation marks omitted). The practical effect would impermissibly
9 regulate interstate online services well beyond California's boundaries, and potentially subject
10 CNN to inconsistent legislation from other states. *See NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir.
11 1993) (Nevada law prescribing procedures for NCAA enforcement proceedings violated Commerce
12 Clause by directly regulating interstate commerce beyond Nevada's boundaries, putting NCAA,
13 and whatever other national collegiate athletic associations may exist, in jeopardy of being
14 subjected to inconsistent legislation).

15 Even if the requested application of the Unruh Act and the CDPA is viewed as only
16 "indirectly" impacting interstate commerce (which is unlikely, given the foregoing), "the burden
17 on interstate commerce clearly exceeds the local benefits." *Healy*, 491 U.S. at 337 n.14. While
18 Plaintiffs may argue California has a legitimate interest in providing disabled Californians greater
19 access to videos on CNN.com, the burden on interstate commerce here should be viewed as far
20 too great for such "local" benefits to overcome. Given that impending federal regulations (due
21 by January, 2012) will address the issues at hand (*i.e.*, closed captioning of Internet videos), and
22 will supplant whatever might be required under the Unruh Act and/or the CDPA, the scope of relief
23 Plaintiffs seek is negligible, relatively speaking. The same ephemeral nature of any local benefits
24 that made the relief sought unconstitutional for purposes of First Amendment scrutiny, *see supra*
25 at 22, also makes it too slight to support the constitutionality under the dormant Commerce Clause
26 of applying the Unruh Act and the CDPA as Plaintiffs seek. Conversely, the order sought by
27 Plaintiffs by this Court would have a substantial and impermissible extraterritorial impact on the

1 provision of online videos, particularly where uniform closed captioning standards are necessary
 2 to the development and distribution of closed captions in an economically and technically feasible
 3 manner.¹⁵ In addition, because the burden(s) imposed would delay, or even prevent (due to cost,
 4 timeliness, or other reasons), the delivery of news – core First Amendment-protected activity – the
 5 burden is especially weighty. This drastic imbalance violates the dormant Commerce Clause. *See,*
 6 *e.g., ACLU v. Johnson*, 194 F.3d at 1161-62 (citing *American Libraries Ass' v. Pataki*, 969 F. Supp.
 7 at 178).

8 **E. Plaintiffs Cannot Prove A Probability of Prevailing on their CDPA Claim.**

9 Plaintiffs allege that CNN violates the CDPA by failing to caption news videos that are
 10 hosted on CNN.com, but the CDPA does not apply to websites. It provides that “[i]ndividuals
 11 with disabilities or medical conditions have the same right as the general public to the full and free
 12 use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, ... public
 13 facilities, and other public places.” Cal. Civ. Code § 54(a). Such “full and equal access” generally
 14 is defined under Section 54.1 to mean that which complies with regulations developed under the
 15 ADA, or under state law, if the latter impose a higher standard. *See* Cal. Civ. Code § 54.1(a)(3)
 16 (for transportation); *Urahausen v. Longs Drug Stores Cal., Inc.*, 155 Cal. App. 4th 254, 263 (2007)
 17 (access to parking). No published appellate decision has interpreted the CDPA to apply to a web-
 18 site that is not related to a brick and mortar place of public accommodation. Indeed, the “Ninth
 19 Circuit has declined to join those circuits which have suggested that a ‘place of public accommo-
 20 dation’ may have a more expansive meaning.” *National Fed’n of the Blind v. Target Corp.*, 452 F.
 21 Supp. 2d 946, 952 (N.D. Cal. 2006). *See also Turner v. American Med. Colls.*, 167 Cal. App. 4th
 22 1401, 1412-13 (2008) (court found no violation of the CDPA where there was no denial of physical
 23

24 ¹⁵ *See NCAA*, 10 F.3d at 640 n.8 (district court’s balancing of state interest versus national uni-
 25 formity was “exactly right”) (citing *NCAA v. Miller*, 795 F. Supp. 1476, 1484-85 (D. Nev. 1992),
 26 which found that, while Nevada law imposing state-specific procedural rules for NCAA enforce-
 27 ment proceedings was legitimate, extraterritorial effect was substantial because it “severely restricts
 28 the NCAA from establishing uniform rules to govern and enforce interstate collegiate practices,”
 thereby allowing state to “dictate enforcement proceedings in states other than Nevada”).

1 access to testing facility). *See also Urahausen*, 155 Cal. App. 4th at 261; *Anderson v. County of*
2 *Siskiyou*, 2010 WL 3619821 (N.D. Cal. Sept. 13, 2010) (CDPA “only guarantees physical access to
3 a facility”); *Madden v. Del Taco, Inc.*, 150 Cal. App. 4th 294, 301 (2007) (Section 54 “has always
4 drawn meaning from a growing body of legislation intended to reduce or eliminate the *physical*
5 *impediments* to participation of physically handicapped persons...”) (emphasis added; internal
6 quotation marks omitted).

7 Thus, consistent with the narrow interpretation of the CDPA taken by the courts, the CDPA
8 applies only to *facilities and physical places* open to the public. Here, Plaintiffs seek to compel
9 CNN to provide closed captioning on all news videos hosted on CNN.com. But CNN.com is a
10 website; there is no physical place of accommodation in California at issue. As a result, Plaintiffs’
11 CDPA claim fails on its face. Plaintiffs therefore cannot show a probability of prevailing on their
12 CDPA claim.

13 **F. Plaintiffs Cannot Prove a Probability of Prevailing on their Unruh Act Claim Because**
14 **They Were Not Treated Differently Because of their Disabilities.**

15 Section 51(b) of the Unruh Act states that “[a]ll persons within the jurisdiction of this state
16 are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin,
17 disability, medical condition, marital status, or sexual orientation are entitled to the full and equal
18 accommodations, advantages, facilities, privileges, or services in all business establishments of
19 every kind whatsoever.” The law has been broadly interpreted by the courts, both federal and state,
20 but “[d]espite its broad application, the Unruh Civil Rights Act does not extend to practices and
21 policies that apply equally to all persons.” *Turner*, 167 Cal. App. 4th at 1408.

22 In 1991, the California Supreme Court held in *Harris v. Capital Growth Investors XIV* that
23 proof of intentional discrimination was required to establish a violation of the Unruh Act and that a
24 neutral policy, *applied equally but having a disparate impact* on a particular protected class, did not
25 violate the Act. 52 Cal. 3d 1142, 1172 (1991). The Unruh Act “explicitly exempts standards that
26 are applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or
27 blindness or other physical disability.” *Id.* at 1172 (internal quotation marks omitted). A policy
28

1 that is neutral on its face is not actionable under the Unruh Act, even when it has a disproportionate
2 impact on a protected class. *Id.* at 1172-73; *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App.
3 4th 1224, 1238 (2007).

4 The plaintiffs in *Harris* argued that minimum income requirements to rent an apartment
5 were discriminatory toward women, because women generally made less money than men and
6 would be turned down for rentals on a more frequent basis than men. But the Court found that
7 such a claim could not be maintained under Section 51, concluding that the Unruh Act requires
8 allegations of “*willful, affirmative misconduct* on the part of those who violate the Act,” and that
9 a plaintiff must allege more than the disparate impact of a facially neutral policy on a particular
10 group. *Id.* at 1174 (emphasis added); *see also Koebke v. Bernardo Height Country Club*, 36 Cal.
11 4th 824, 853 (2005) (“Adoption of the disparate impact theory [to the Unruh Act] would expose
12 businesses to new liability and potential court regulation of their day-to-day practices in a manner
13 never intended by the Legislature. This we decline to do.”).

14 California courts have repeatedly applied this rule and reached the same conclusion. For
15 example, in *Belton*, the court of appeal rejected an argument that Comcast intentionally discrimi-
16 nated against blind customers because it offered its music packages only with its television pack-
17 ages, and blind customers could not fully use the television. *Id.* at 1237-38. In line with the *Harris*
18 and *Koebke* holdings, the *Belton* court held that a facially neutral policy offering the same package
19 deal on music and television to everyone did *not* violate the Unruh Act because it was applied
20 equally to all customers and did not target those with visual disabilities – even though it may have
21 had a disparate impact on them. *Id.* *See also Turner v. American Med. Colls.*, *supra* at 27-28.

22 Federal courts agree. For example, in *Young v. Facebook, Inc.*, 2011 WL 1878001 (N.D.
23 Cal. May 17, 2011), the plaintiff argued that Facebook’s customer service system was difficult for
24 her to use due to her bipolar disorder. The court held that she could not maintain a claim under
25 Section 51 because she failed to allege any intentionally discriminatory acts. In other words, the
26 plaintiff did not allege, as required, that Facebook treated her differently *because* of her disability
27 or that Facebook applied its policies in a way that *targets* individuals with disabilities. As a result,

1 she was unable to maintain her claims under Section 51. *Id.*; see also *Torres v. AT&T Broadband,*
2 *LLC*, 158 F. Supp. 2d 1035, 1038 (N.D. Cal. 2001) (digital cable service does not fall under ADA’s
3 12 enumerated categories of “public accommodation” and, thus, the ADA did not require a channel
4 menu to be accessible to the visually impaired).

5 The same rule applies here. For legitimate reasons outlined in the Smith Declaration,
6 CNN.com does not currently offer closed captioning to anyone accessing news videos hosted on its
7 website. Its policy is facially neutral. Plaintiffs cannot present any evidence that the policy was put
8 in place to target persons with hearing disabilities or that they were treated differently because of
9 their disabilities. Thus, Plaintiffs’ claim under Section 51 fails as a matter of law, because there is
10 no evidence of intentional discrimination by CNN and no evidence that CNN posts news videos on
11 CNN.com in a way that targets people with hearing disabilities.

12 Finally, in the Complaint, Plaintiffs attempt to turn their disparate impact claim into a case
13 of intentional discrimination by alleging that it requested in a single letter that Time Warner
14 provide captioning for its videos on CNN.com. Plaintiffs allege that “Time Warner refused this
15 request and has therefore intentionally excluded deaf and hard of hearing visitors to CNN.com
16 access to the videos offered to hearing visitors.” Compl. ¶ 32. That effort does not remedy the
17 fatal flaw in their argument, because *Plaintiffs still cannot show that they were treated differently*
18 *because of their disabilities*, a necessary element of their claim under the Unruh Act. See *Harris,*
19 *52 Cal. 3d at 1172*. To prove a claim of intentional discrimination under the Unruh Act, “a plaintiff
20 must allege more than the disparate impact of a facially neutral policy on a particular group.”
21 *Young*, 2011 WL 1878001, at *3 (citing *Koebke*, 36 Cal. 4th at 854.) Plaintiffs’ Complaint makes
22 clear that Plaintiffs were *not* treated differently from anyone else because of their disabilities. See
23 *generally*, Complaint.

24 Moreover, with regard to CNN’s alleged “refusal” to accommodate, CNN and Time
25 Warner’s years-long commitment and continuing contributions to captioning technologies and
26 the regulatory process related to them plainly establish that there was no refusal to act in any case.
27 Smith Decl. ¶ 25. Plaintiffs have not been deprived of access to CNN.com. As discussed above,

1 Plaintiffs have the same access to CNN.com as everyone else, on the same basis as everyone else.
 2 Indeed, the primary content found on CNN.com is text accompanied by photographs, which are all
 3 fully accessible to persons with hearing disabilities. *See* Toppo Decl. ¶ 19.

4 Because Plaintiffs cannot show they were treated differently because of their disabilities or
 5 that they were targeted for disparate treatment, there is no violation of the Unruh Act and, as set
 6 forth in Section IV(G), below, CNN did not fail to accommodate under the ADA. *See Koebke*, 36
 7 Cal. 4th at 854.

8 **G. Plaintiffs Cannot Bring Their Claims Under Sections 51(f) and 54(c) of the Unruh Act**
 9 **or the CDPA.**

10 After the federal ADA passed, the California Legislature added Section 51(f) of the Unruh
 11 Act and Section 54(c) of the CDPA. These sections both state that a “violation of the right of any
 12 individual under the [ADA] shall also constitute a violation of this section.” The ADA provides
 13 that “[n]o individual shall be discriminated against on the basis of disability in the full and equal
 14 enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place
 15 of public accommodation *by any person who owns, leases (or leases to), or operates a place of*
 16 *public accommodation.*” 42 U.S.C. § 12182(a) (emphasis added). Under controlling Ninth Circuit
 17 authority, “places of public accommodation” under the ADA are limited to actual physical spaces.
 18 *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).¹⁶

19 In *National Federation of the Blind v. Target Corp.*, this district considered whether the
 20 national retailer’s website, www.Target.com, was a place of public accommodation under the
 21 ADA. 452 F. Supp. 2d 946 (N.D. Cal. 2006). The plaintiffs argued that the Target.com website
 22

23 ¹⁶ The addition of Section 51(f) to the Unruh Act created an ambiguity concerning whether *in-*
 24 *tentional* discrimination was still a required element of a claim under Section 51. The California
 25 Supreme Court resolved that ambiguity in *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661 (2009), hold-
 26 ing that Section 51(f) was an exception to the still-valid requirement to establish intentional discrimi-
 27 nation under the Unruh Act. Thus, a violation of the Act may be maintained where a plaintiff
 28 pleads “intentional discrimination in public accommodations in violation of the terms of the Act”
or where a violation of the federal ADA has occurred. *Id.* at 698 (quoting *Harris*, 52 Cal. 3d at
 1175).

1 offered some services and goods that were only available *in Target's brick and mortar stores, thus*
2 *creating a nexus between the website and a physical place of public accommodation.* Based on that
3 nexus, the court ultimately found plaintiffs in that case had stated a claim under the ADA “to the
4 extent that plaintiffs allege that the inaccessibility of Target.com *impedes the full and equal enjoy-*
5 *ment of goods and services in Target stores.”* *Id.* at 956. But it also held that, “[t]o the extent that
6 Target.com offers information and services *unconnected to Target stores,* which do not affect the
7 enjoyment of goods and services offered in Target stores, *the plaintiffs fail to state a claim* under
8 Title III of the ADA.” *Id.* (emphasis added).

9 The plaintiff in *Young v. Facebook* made a similar argument and also failed to state a claim
10 under the ADA. The plaintiff alleged that, since Facebook gift cards are sold in stores across the
11 country, there was a sufficient nexus to a physical place of public accommodation to require that
12 Facebook make its website accessible. But the court found that the nexus to the stores in *Young*
13 was lacking because Facebook did not own or operate the stores and thus was not an entity or
14 “person who owns, leases (or leases to) or operates a place of public accommodation,” as required
15 under Title III of the ADA. As a result, Facebook was not a covered place of public accommoda-
16 tion under the ADA, and the plaintiff’s claim failed. *See id.*; 42 U.S.C. § 12182(a).

17 Like Facebook, CNN maintains no physical place of public accommodation in California
18 in relation to the news videos it hosts on CNN.com. Indeed, Plaintiffs can point to no content on
19 CNN.com that provides a nexus to a place of public accommodation under the ADA. Unlike
20 Target.com, CNN.com does not offer goods and services that are available at a place of public
21 accommodation only. This situation more closely mirrors the *Young* case – CNN.com does not
22 own, lease, or operate places of public accommodation that are linked to its news website.
23 Accordingly, because CNN.com is not a “place of public accommodation” subject to the ADA,
24 there is no nexus between CNN.com and any such place of public accommodation and Plaintiffs
25 cannot show a probability of prevailing under Section 51(f) of the Unruh Act or Section 54(c)
26 of the CDPA.

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18

19 GREATER LOS ANGELES AGENCY ON)
20 DEAFNESS, INC., DANIEL JACOB,)
EDWARD KELLY and JENNIFER OLSON,)
21 on behalf of themselves and all others similarly)
situated,)

22 Plaintiffs,

23 vs.

24 TIME WARNER, INC., a Delaware)
25 Corporation,)

26 Defendant.)
27)
28)

Case No. **CV 11-03458-LB**

DEFENDANT CABLE NEWS NETWORK, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF SPECIAL MOTION TO STRIKE PLAINTIFFS' COMPLAINT

Date: February 2, 2012
Time: 11:00 a.m.

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Courtroom 4

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1 At the Court's invitation, Defendant Cable News Network, Inc. ("CNN") respectfully
2 submits this supplemental brief regarding "prong one" of California's anti-SLAPP statute (Code
3 of Civil Procedure Section 425.15), in support of its Special Motion to Strike Plaintiffs Greater
4 Los Angeles Agency on Deafness, Inc., Daniel Jacob, Edward Kelly, and Jennifer Olson's
5 ("Plaintiffs") Complaint.

6 1. INTRODUCTION

7 The narrow reading of the anti-SLAPP statute offered by Plaintiffs is prohibited by
8 explicit statutory language and by binding precedent from both the Ninth Circuit and the
9 California Supreme Court. In 1997, in response to concerns that the anti-SLAPP statute was
10 being applied more narrowly than intended, the California Legislature amended the statute to
11 expressly provide that it "shall be construed broadly." Cal. Civ. Proc. Code § 425.16 (a). *See*
12 concurrently filed Request for Judicial Notice and Supplemental Declaration of Thomas R. Burke
13 & Ex. A (attaching legislative history). Consistent with this broad interpretation, this Court
14 should find that Plaintiff's Complaint satisfies prong one of the anti-SLAPP statute for the
15 following three reasons.

16 *First*, Plaintiffs' claims unquestionably "aris[e] from" CNN's constitutionally-protected
17 free speech rights "in furtherance of" its publication of news videos on CNN.com. Cal. Civ. Proc.
18 Code § 425.16 (b)(1). Millions of people access CNN's news videos to learn about important
19 news developments of the day. News entities like CNN routinely assert—and enjoy the protection
20 provided by—the anti-SLAPP statute because their business involves reporting and publishing
21 news, and such activity is protected by the anti-SLAPP statute's protection of "conduct in
22 furtherance of the exercise of the constitutional right ... of free speech in connection with a public
23 issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16 (b)(1), (e)(4). Even if the
24 Court were to narrowly interpret the acts underlying Plaintiffs' claims as involving CNN's
25 "mechanical" delivery of captioned news content to its online viewers, this purportedly benign
26 construction urged by Plaintiffs would not avoid the anti-SLAPP statute. The uncontradicted
27 evidence shows that CNN acted in furtherance of its free speech rights—and out of concern that
28 the disabled receive accurate translations of the news—when it decided not to unilaterally adopt

1 closed captioning technology for Internet videos that could compromise the accuracy of
2 information in CNN's news videos. *See* Reply Declaration of Clyde D. Smith ¶¶ 8-10; *see also*
3 *Kronemyer v. Internet Movie Data Base, Inc.*, 150 Cal. App. 4th 941, 947 (2007) (web site could
4 not be compelled to provide content with errors in it; such a lawsuit was subject to the anti-
5 SLAPP statute).

6 *Second*, CNN's interpretation of prong one of the anti-SLAPP statute is supported by
7 binding decisions of the Ninth Circuit and California Supreme Court that require the statute to be
8 broadly construed. *See* Section 2.A, *infra*. The decisions of these courts are consistent with both
9 the express language and legislative history of the anti-SLAPP statute – particularly as the statute
10 was amended in 1997 – that make plain an entity's speech and/or conduct in furtherance of its
11 speech fit within the statute's broad confines. *See* Section 2.B, *infra*.

12 *Third*, Plaintiffs' impermissibly narrow interpretation of the anti-SLAPP only finds
13 support in unpublished district court opinions that have no precedential value and are flawed in
14 their anti-SLAPP analysis or that did not involve a news organization's free speech activities. *See*
15 Sections 3 & 4, *infra*.

16 Rather than seek industry-wide reforms through the FCC's rulemaking process or include
17 a broad spectrum of news entities as defendants to this lawsuit, Plaintiffs single out CNN alone to
18 be required to use captioning technology that is not only incompatible with CNN's editorial
19 standards but which also imposes discriminatory costs on CNN's speech not borne by its news
20 competitors. Given the serious concerns about the constitutional issues raised by Plaintiff's
21 lawsuit that this Court articulated at the December 1, 2011, hearing, there can be no question that
22 CNN satisfies prong one of the anti-SLAPP statute. *See* Cal. Civ. Proc. § 425.16 (b) (2) ("In
23 making its determination [as to whether the anti-SLAPP statute applies and should be granted],
24 the court *shall consider* the pleadings, and supporting *and opposing affidavits stating the facts*
25 *upon which the liability or defense is based.*") (emphasis added); *Navellier v. Sletten*, 29 Cal. 4th
26 82, 89 (2002) (quoting Cal. Civ. Proc. Code § 425.16 (b)(2)). Under these circumstances, it is
27 impossible to conclude that Plaintiffs' claims are not based on CNN's conduct arising from and in
28 furtherance of its free speech rights fully protected by the anti-SLAPP statute.

1 For all these reasons and for the reasons set forth in the earlier briefing, CNN respectfully
 2 requests that the Court grant CNN's anti-SLAPP Motion and strike Plaintiffs' Complaint.

3 **2. CNN SATISFIES THE FIRST PRONG OF THE ANTI-SLAPP STATUTE.**

4 **A. The Ninth Circuit And California Supreme Court Consistently Have Broadly**
 5 **Construed The anti-SLAPP Statute.**

6 The Ninth Circuit, sitting in diversity, consistently has held, in decisions that are binding
 7 on this Court, that the anti-SLAPP statute must be "construed broadly," and that the statute
 8 extends to a broad range of conduct in furtherance of speech on matters of interest to the public.
 9 *Hilton v. Hallmark Cards*, 599 F.3d 894, 906 (9th Cir. 2010). *Accord Mindys Cosmetics, Inc. v.*
 10 *Dakar*, 611 F.3d 590, 595 (9th Cir. 2010) ("we follow the California legislature's direction that
 11 the anti-SLAPP statute be 'construed broadly'"); *Manufactured Home Communities, Inc. v.*
 12 *County of San Diego*, 655 F.3d 1171, 1176 (9th Cir. 2011) ("[t]he legislature instructed courts that
 13 the statute 'shall be construed broadly'"); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109-
 14 1110 (9th Cir. 2003) (noting that "California and federal courts have repeatedly permitted
 15 defendants to move to strike under the anti-SLAPP statute despite the fact that they were neither
 16 small nor championing individual interests," and finding lawsuit came within anti-SLAPP statute
 17 where defendants engaged in advocacy activities concerning promoting sales of Ritalin,
 18 "particularly in light of the statutory directive that it be 'construed broadly'"); *United States ex*
 19 *rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 971 (1999) (noting that anti-
 20 SLAPP statute must be "construed broadly").

21 The California Supreme Court requires the same. It has set forth these same basic
 22 principles in many cases where it has broadly construed the anti-SLAPP statute and applied it to a
 23 variety of conduct and speech. *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th
 24 1106, 1121-1122 (1999) (tracing the legislative history of the broad construction amendment to
 25 the anti-SLAPP statute in 1997 and using these principles to find the anti-SLAPP statute applied);
 26 *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 61 (2002) (requiring defendant to
 27 show "intent to chill" for anti-SLAPP statute to apply violates broad construction mandate in
 28 Code of Civil Procedure § 425.16(a)); *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 735

1 (2003) (adhering to the “express statutory command” that the anti-SLAPP statute be “construed
2 broadly”); *Navellier*, 29 Cal. 4th at 91 (explaining that the anti-SLAPP statute does not exclude
3 any particular type of cause of action from its operation, and refusing to adopt plaintiffs’ request
4 to exclude contract and fraud causes of action from the anti-SLAPP statute’s ambit because it
5 “would contravene the Legislature’s express command that section 425.16 ‘shall be construed
6 broadly’”); *Soukop v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 279 (2006) (“the Legislature
7 has directed that the statute ‘be construed broadly.’ To this end, when construing the anti-SLAPP
8 statute, ‘[w]here possible, we follow the Legislature’s intent, as exhibited by the plain meaning of
9 the actual words of the law...”) (internal citations omitted); *Kibler v. Northern Inyo County Local
10 Hospital Dist.*, 39 Cal. 4th 192, 199 (2006) (following the Legislature’s requirement that the
11 courts must “broadly construe” the anti-SLAPP statute, and applying it to hospital peer review
12 proceedings); *Club Members For An Honest Election v. Sierra Club*, 45 Cal. 4th 309, 318 (2008)
13 (because anti-SLAPP statute must be construed broadly, exemption for cases brought purely in
14 the public interest was construed narrowly to conform with legislative intent); *Vargas v. City of
15 Salinas*, 46 Cal. 4th 1, 19 (2009) (noting that after courts narrowly interpreted anti-SLAPP statute,
16 Legislature passed amendment in 1997 clarifying its intent that statute be interpreted broadly, and
17 using a broad interpretation to find that the anti-SLAPP statute applied to claims against
18 government officials); *Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal. 4th 12, 21-22 (2010)
19 (recognizing that anti-SLAPP statute must be “construed broadly,” and in turn interpreting
20 commercial speech exemption to anti-SLAPP statute narrowly to conform with legislative intent).
21 *See also Hilton*, 599 F.3d at 905 (“we must begin with the pronouncements of the state’s highest
22 court, which bind us” in a diversity case).

23 *Hilton* is instructive. In that case, the Ninth Circuit recognized that the defendant’s
24 “threshold showing” was to establish “that the act or acts of which the plaintiff complains were
25 taken in furtherance of the [defendant’s] right to petition or free speech under the United States or
26 California Constitution in connection with a public issue [or an issue of public interest].” *Id.* at
27 903 (quoting *Equilon Enterprises*, 29 Cal. 4th at 67) (brackets in original). The Ninth Circuit
28 further explained that “[b]y its terms, this language includes not merely actual exercises of free

1 speech rights but also conduct that furthers such rights.” *Id.* (quoting Cal. Civ. Proc. Code
2 § 425.16(e)(4)). The Court observed that some California courts had not even bothered to discuss
3 the “conduct” part of the showing in finding, for example, that an email message was “in
4 furtherance” of free speech rights or even that campaign money laundering was in furtherance of
5 political speech (although it was an invalid exercise of speech because it was obviously illegal).
6 *Id.* (citing *Integrated Healthcare Holdings v. Fitzgibbons*, 140 Cal. App. 4th 515, 525-526 (2006)
7 and *Paul for Council v. Hanyecz*, 85 Cal. App. 4th 1356, 1366 (2001), overruled in part on other
8 grounds in *Equilon Enterprises*, 29 Cal. 4th at 68). These examples of “conduct” that fits within
9 the anti-SLAPP statute prompted the Ninth Circuit to declare that “*the courts of California have*
10 *interpreted this piece of the defendant’s threshold showing rather loosely.*” *Id.* at 904 (emphasis
11 added). Hence, in *Hilton*, Hallmark’s acts of creating stylized messages on greeting cards that
12 buyers could personalize qualified as “conduct” in furtherance of free speech within the meaning
13 of the anti-SLAPP statute. *Id.* at 904-905.

14 The Ninth Circuit also gave a broad interpretation to the “public issue or issue of public
15 interest” requirement in conformance with the express statutory intent of the California
16 Legislature, as reflected in the California Supreme Court cases on the subject. *Id.* at 905-906
17 (quoting *Equilon Enterprises*, 29 Cal. 4th at 61; *Navellier*, 29 Cal. 4th at 91; *Briggs*, 19 Cal. 4th at
18 1121-1122). The Ninth Circuit noted that one California court of appeal had concluded that “‘an
19 issue of public interest’ ... is *any issue in which the public is interested.*” *Id.* at 907 (quoting
20 *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008) (emphasis in original)).
21 Another court had framed the public issue requirement as extending to “conduct that could
22 directly affect a large number of people beyond the direct participants” or to “a topic of
23 widespread, public interest.” *Id.* at 906 (quoting *Rivero v. American Federation Of State, County*
24 *& Municipal Employees*, 105 Cal. App. 4th 913, 924 (2003)). A third court has stated that “a
25 matter of public interest should be of concern to a substantial number of people” and a connection
26 should be shown between the conduct and the public interest. *Id.* at 906-907 (quoting *Weinberg v.*
27 *Feisel*, 110 Cal. App. 4th 1122, 1133 (2003)). Under any of these tests, consistent with the
28

1 statute's broad construction requirement, CNN's publication of news videos accessed by millions
2 of people is protected by the anti-SLAPP statute.

3 The California Supreme Court repeatedly and consistently has rejected attempts to narrow
4 the scope of the anti-SLAPP statute. In *Briggs*, 19 Cal. 4th at 1118, the 1999 case in which the
5 California Supreme Court first considered the anti-SLAPP statute after the 1997 broad
6 construction amendment, the Court refused to impose a requirement that defendants show that
7 plaintiff's action was not brought in the public interest. As a matter of "public policy," a narrow
8 construction of the statute "would serve Californians poorly," the Court held.¹ Three years later,
9 in three decisions decided the same day, the Court further expanded the parameters of prong one
10 of the anti-SLAPP statute. In *Equilon Enterprises*, 29 Cal. 4th at 59-61, the California Supreme
11 Court rejected the claim by Plaintiffs that the anti-SLAPP statute applied only when the defendant
12 could show that plaintiffs brought the lawsuit with an intent to chill speech or conduct in
13 furtherance of speech. As the Court explained:

14 The Legislature recognized that 'all kinds of claims could achieve the objective of
15 a SLAPP suit – to interfere with and burden the defendant's exercise of his or her
16 rights.' [Citation omitted.] For us to bar use of the anti-SLAPP device against
17 nonmeritorious *speech-burdening claims* whenever a defendant cannot prove the
18 plaintiff's improper intent would fly in the face of that legislative recognition.

19 *Id.* at 60 (emphasis added). Similarly, in *Navellier*, 29 Cal. 4th at 91-92, the Court rejected
20 plaintiff's assertion that breach of contract and fraud claims were not covered by Section 425.16.
21 The court specifically followed Section 425.16(b)(2), which requires a court to consider the
22 parties' pleadings, including opposing affidavits, when deciding whether the anti-SLAPP statute
23 applies. 29 Cal. 4th at 89. Acknowledging the broad construction rule, the Court recognized that
24 the anti-SLAPP statute does not exclude "any particular type of action from its operation." The
25 Court refused to narrow the statute in such a manner, stating that "no court has the 'power to

26 ¹ In *Briggs*, the Court stressed that "[t]he Legislature *already has weighed an appropriate*
27 *concern* for the viability of meritorious claims" and has provided "substantive and procedural
28 limitations that protect plaintiffs against overbroad application of the anti-SLAPP mechanism."
19 Cal. 4th 1106, 1122-1123 (emphasis added). It further stated: "*We find no grounds for*
reweighing these concerns in an effort to second-guess the Legislature's considered policy
judgment." *Id.* at 1123 (emphasis added). Accordingly, this Court should not second-guess the
Legislature's judgment in requiring all facets of the anti-SLAPP statute to be construed broadly.

1 rewrite the statute so as to make it conform to a presumed intention which is not expressed.” *Id.*
 2 (quoting *California Teachers Ass’n v. Governing Bd. of Rialto Unified School Dist.*, 14 Cal. 4th
 3 627, 633 (1997)). And in *City of Cotati v. Cashman, et al.*, 29 Cal. 4th 69, 75 (2002), the Court
 4 declined to impose the requirement Plaintiffs seek to impose here that the cause of action “had, or
 5 will have, the actual effect of chilling the defendant’s exercise of speech or petition rights.”² The
 6 Court held a “chilling effect” requirement was “too restrictive” and would contravene the
 7 legislative intent to broadly protect speech and petitioning activities.³

8 These binding Ninth Circuit and California Supreme Court cases show the many times that
 9 these courts have consistently invoked the broad construction rule and applied it when plaintiffs
 10 sought to narrow application of the anti-SLAPP statute. The broad construction rule is well
 11 entrenched in the case law construing the breadth of the anti-SLAPP statute, and applies to every
 12 aspect of the first prong inquiry, including the “arising from” and “public issue or issue of public
 13 interest” parts of the test acknowledged by the Ninth Circuit in *Hilton*.

14 **B. The Legislative History Of The Anti-SLAPP Statute Confirms The Legislative Intent**
 15 **To Broadly Protect Communicative And Noncommunicative Conduct In**
 16 **Furtherance Of Speech.**

17 As the California Supreme Court repeatedly has recognized, the legislative intent that the
 18 anti-SLAPP statute be given a broad construction “is expressed in unambiguous terms,” and “we
 19 must treat the statutory language as conclusive.” *See Briggs*, 19 Cal. 4th at 1119-1120 (quoting
 20

21 ² The Court found that the anti-SLAPP statute applied in *Equilon Enterprises* and
 22 *Navellier*, but that it did not apply in *City of Cotati*. In *City of Cotati*, 29 Cal. 4th at 80, the Court
 23 stated that the act underlying the City of Cotati’s state lawsuit was a request to adjudicate the
 24 constitutionality of a mobile home ordinance. Although the City of Cotati’s state lawsuit was
 25 filed *after* the mobile home residents had filed a federal action, it did not follow that the City of
 Cotati’s lawsuit *arose from* the residents’ lawsuit, because what the City of Cotati wanted was a
 resolution of the underlying issue about the ordinance. This circumstance is far afield of the
 situation here, where Plaintiffs seek to judicially compel CNN to speak using captioning
 technology that is inconsistent with its editorial standards. *See Section 2.C, infra*.

26 ³ Logically, the converse of *City of Cotati* also should apply – that where, as here, CNN
 27 has demonstrated with uncontroverted evidence that Plaintiffs’ lawsuit will have the actual effect
 28 of compelling CNN to speak in ways that it would not otherwise, Plaintiffs’ lawsuit is one that fits
 comfortably within the anti-SLAPP statute. *See Cal. Civ. Proc. Code* § 425.16 (b)(2); *Navellier*,
 29 Cal. 4th at 89; *Section 2.C, infra*.

1 Code of Civil Procedure Section 425.16 (a)); *Equilon*, 29 Cal. 4th at 61-62. The Court repeatedly
2 has reviewed the legislative history of Section 425.16 and “observe[d] that available legislative
3 history buttresses the conclusion” that the anti-SLAPP statute must be construed broadly in
4 concert with the amendment to the anti-SLAPP statute enacted by the California Legislature in
5 1997. *See id.*

6 The legislative history of the 1997 amendment – Senate Bill 1296 – shows that fifteen
7 years before the federal district court made the claim in *Doe v. Gangland Prods., Inc.*, 2011 U.S.
8 Dist. LEXIS 89472, at *14-*16, about a “broad interpretation” of the anti-SLAPP statute being
9 “contrary to the legislative intent” and opined that the anti-SLAPP statute “must have limits,” the
10 First Appellate District of the California Court of Appeal made a similar claim that the anti-
11 SLAPP statute should be construed narrowly and could not possibly extend to statements made by
12 a litigant to the *San Jose Mercury News* regarding the litigation. *Zhao v. Wong*, 48 Cal. App. 4th
13 1114 (1996) (superseded by statute as stated in *Briggs*, 19 Cal. 4th at 1123 n.10). “It cannot be
14 seriously contended that every comment on a lawsuit involves a public issue,” the *Zhao* court
15 stated. *Id.* at 1131. *See* Ex. A to Suppl. Burke Decl. & Request for Judicial Notice.

16 In response, at the behest of the California Newspaper Publishers Association, the anti-
17 SLAPP statute’s original author, Bill Lockyer, sponsored an amendment to the anti-SLAPP
18 statute clarifying that it *is* intended to be broadly construed and that it extends to a variety of
19 conduct and not just actual exercises of free speech or the right to petition. *See* Request for
20 Judicial Notice, Ex. A (at 10, 33, 38, 71, 81).⁴ To promote this objective, Lockyer and the
21 California Legislature added the language in Section 425.16(a) that this “*section* shall be
22 construed broadly,” meaning the entire statute. The proponents of the 1997 amendment believed
23 that “the additional declaration of Legislative intent would strengthen the statute against narrow
24 readings of its protections, which in turn would better protect a person’s exercise of his or her
25 constitutional rights of petition and free speech in matters of public significance against meritless

26
27 ⁴ “This bill is sponsored by the California Newspaper Publishers Association to address
28 recent court cases that have too narrowly construed California’s anti-SLAPP suit statute.” *Id.* at
76 (June 23, 1997 Assembly Judiciary Committee Analysis).

1 claims designed to stifle that exercise.” *Id.* at 34 (May 12, 1997 Senate Judiciary Committee
2 Analysis); 37 (May 12, 1997 Senate Floor Analysis Third Reading); 92 (June 23, 1997 Senate
3 Floor Unfinished Business Analysis).

4 As part of the broadening of the anti-SLAPP statute, the Legislature in 1997 also added a
5 new broader category of activity that fit within the anti-SLAPP statute: Code of Civil Procedure
6 Section 425.16 (e)(4), which applies to “any other conduct in furtherance of the exercise of the
7 constitutional right of petition or the constitutional right of free speech in connection with a public
8 issue or an issue of public interest.” *Id.* at 32 (May 12, 1997 Senate Judiciary Committee
9 Analysis). As most of the committee analyses reflect, the “any other conduct” language in (e)(4)
10 was intended to codify that “**Section 425.16 applies to both ‘communicative conduct and**
11 **‘noncommunicative conduct.’**” *Id.* at 33 (May 12, 1997 Senate Judiciary Committee Analysis);
12 38 (May 12, 1997 Senate Floor Analysis Third Reading); 86 (June 23, 1993 Senate Floor
13 Unfinished Business Analysis) (emphasis added). “This bill would reflect that law and
14 specifically apply the provisions of Section 425.16” to both communicative and
15 noncommunicative conduct that is in furtherance of free speech of petition rights. *See id.* at 86
16 (June 23, 1993 Senate Floor Unfinished Business Analysis). Both the state Senate and the
17 Assembly analyses reflect the Legislature’s observation that “some courts have failed to
18 understand that this statute covers **any conduct** in furtherance of the constitutional rights of
19 petition and of free speech in connection with a public issue or with any issue of public interest.”
20 *Id.* at 76 (June 23, 1997 Assembly Judiciary Committee Analysis) (emphasis added); 80 (Senate
21 Third Reading Analysis).

22 The report from the office of then-Gov. Pete Wilson also reflects the intention to broaden
23 the statute, stating that “[t]his bill would expand the scope of the SLAPP statute and would
24 increase the ability of defendants to dismiss frivolous lawsuits.” *Id.* at 101 (Governor’s Office of
25 Planning & Research Enrolled Bill Report). The Governor’s report declared:

26 This amendment would still require that any non-official proceeding related speech
27 protected by the SLAPP statute would have to be on an issue of public interest, but
28 would remove the loophole that the only speech protected is speech made in a
public forum. Because of this, the amount of speech protected by the SLAPP
statute would increase significantly. ... This bill ... would expand the definition
of an act in furtherance of a person’s right of free speech. This bill would resolve

1 most of the conflict in the appellate courts about the proper interpretation of the
 2 SLAPP statute, and add significant protections to individuals asserting their
 3 constitutional rights of free speech and petition. By increasing the scope of the
 statute, the overall result of SB 1296 would likely be a reduction in frivolous
 lawsuits.

4 *Id.* at 102. The Senate (34-0) and the Assembly (69-0) passed unanimously the amendment – SB
 5 1296 – and Gov. Wilson signed it into law shortly thereafter.

6 The legislative history thus reinforces the express statutory command that all aspects of
 7 the anti-SLAPP statute must be construed broadly, and reflects the California Legislature’s intent
 8 that the courts apply the statute broadly to both communicative and noncommunicative conduct in
 9 furtherance of free speech or petition. Indisputably, this legislative history refutes Plaintiffs’
 10 assertion that the anti-SLAPP statute is not triggered by this lawsuit because Plaintiffs allegedly
 11 only seek to impose a “mechanical” content neutral closed captioning requirement on CNN.

12 **C. The Lawsuit Arises From CNN’s Acts In Furtherance Of Speech.**

13 **1. Plaintiffs’ Lawsuit Is Based On CNN’s Speech On The Internet.**

14 Section 425.16’s “definitional focus is not the form of the plaintiff’s cause of action but,
 15 rather, the defendant’s *activity* that gives rise to his or her asserted liability” and whether that
 16 activity constitutes conduct in furtherance of free speech on a public issue or issue of public
 17 interest or of the right of petition. *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679
 18 (2010) (quoting *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129
 19 Cal. App. 4th 1228, 1244 (2005) (emphasis in original)). *Accord Navellier*, 29 Cal. 4th at 92.

20 With a notable lack of success, plaintiffs have attempted to divorce the specific conduct
 21 involving them from the overall broadcast or speech at issue. For example, in *M.G. v. Time*
 22 *Warner, Inc.*, 89 Cal. App. 4th 623, 628-629 (2001), the plaintiffs claimed that their specific
 23 appearances in a Little League photograph that accompanied an article and broadcast about youth
 24 molestation in sports were not acts in furtherance of free speech on a matter of public interest
 25 within the meaning of the anti-SLAPP statute. However, the Court rejected this formulation as
 26 “too restrictive.” *Id.* The Court recognized that the anti-SLAPP statute regularly had been
 27
 28

1 applied to media defendants,⁵ and noted that “[f]reedom of the press and free speech rights are
 2 **unquestionably implicated here.**” *Id.* (emphasis added). “Consonant with the mandate to give a
 3 broad interpretation to the anti-SLAPP statute,” the Court stated the focus had to be on the general
 4 subject matter of the publications, the issue of youth molestation in sports, and could not be drawn
 5 narrowly as being about the decision to publish a photo making public the identities of specific
 6 molestation victims. Similarly, in *Taus v. Loftus*, 40 Cal. 4th 683 (2007), the California Supreme
 7 Court examined the defendant’s “**general course of conduct**” (investigations and responsive
 8 articles questioning the conclusions of other scientists as to the scientific controversy over so
 9 called “recovered memories”) and found “there can be no question” that it was “clearly activity”
 10 in furtherance of free speech in connection with a “public issue.” *Id.* at 712-713 (emphasis
 11 added). *See also Kearney v. Foley & Lardner LLP*, 590 F.3d 638, 648-649 (9th Cir. 2009)
 12 (communications with witness related to eminent domain proceeding and disclosures in ongoing
 13 litigation qualified as “conduct” within the scope of the anti-SLAPP statute because they were in
 14 furtherance of constitutional petition rights). And in *Stewart*, 181 Cal. App. 4th at 677-679, the
 15 appellate court agreed with the trial court that *Rolling Stone*’s layout decision to place an editorial
 16 feature on bands next to a tobacco company’s similar advertising feature was subject to First
 17 Amendment protection and the anti-SLAPP statute, but stated that the focus of the first prong
 18 inquiry should be broadly on the publication of the feature article rather than narrowly on the
 19 magazine’s layout decision.⁶

20 ⁵ In *M.G.*, 89 Cal. App. 4th at 629 n.8, the court cited as examples of cases where the
 21 courts applied the anti-SLAPP statute to media defendants the following: *Sipple v. Foundation for*
 22 *Nat’l Progress*, 71 Cal. App. 4th 226, 240 (1999); *Braun v. Chronicle Publishing Co.*, 52 Cal.
 App. 4th 1036, 1044 (1997); *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App.
 4th 855, 863 (1995).

23 ⁶ *See also Terry v. Davis Community Church*, 131 Cal. App. 4th 1534 (2005) (in finding
 24 that anti-SLAPP statute applied, dismissing plaintiff’s argument that court should focus narrowly
 25 on decision to reveal individual victim’s identity rather than on broad topic of child molestation
 26 raised in church discussions convened to prevent it from happening); *Four Navy Seals v.*
 27 *Associated Press*, 413 F. Supp. 2d 1136, 1149 (S.D. Cal. 2005) (finding that Section 425.16
 28 applied because focus was on article’s discussion of treatment of Iraqi captives by members of the
 United States military rather than on newsgathering and publication of photograph of the involved
 plaintiff soldiers). *Doe v. Gangland Prods.*, 2011 U.S. Dist. LEXIS 89472, at *17-*22,
 contradicts all of these published cases by narrowly framing the issue as being confined to the
 decision to reveal the plaintiff former gang member’s identity rather than the broader subject of
 the documentary about gangs in America. *See discussion infra.* at 4.

1 Following these cases, the focus here should be on the fact that Plaintiff's lawsuit takes
2 aim at CNN's speech on the Internet – its presentation and publication of news videos of the day
3 on CNN.com. As CNN explained in its earlier briefing (Motion at 7), it is indisputable that
4 Plaintiffs' claims target how CNN publishes online news videos that feature CNN's reporting on
5 important news events occurring around the world. This Court acknowledged that reality during
6 the December 1, 2011 hearing. Applying the broad construction rule that both the Ninth Circuit
7 and California Supreme Court have repeatedly invoked (*see* Section 2.A, *infra*), both CNN's news
8 reporting and publishing activities on matters of great public interest (*e.g.*, the war in Afghanistan,
9 the unrest in Egypt, the U.S. presidential election, the trial of the Michael Jackson doctor)
10 unquestionably qualify as conduct in furtherance of free speech within the meaning of the anti-
11 SLAPP statute. *See Lieberman v. KCOP Television*, 110 Cal. App. 4th 156, 166 (2003) (anti-
12 SLAPP statute extends not only to the exercise of free speech, but also to conduct in furtherance
13 of free speech such as news reporting and exercising editorial discretion); cases cited in Motion at
14 7.

15 **2. CNN's Decision Not To Use Closed-Captioning Technology That Does**
16 **Not Satisfy CNN's Editorial Standards Is An Act In Furtherance Of**
17 **Free Speech That Comes Within The Anti-SLAPP Statute.**

18 Even if the Court were inclined to accept Plaintiffs' narrow interpretation of CNN's "acts"
19 at issue in this lawsuit, CNN still satisfies prong one of the anti-SLAPP statute because the statute
20 extends to an Internet publisher's decision not to publish inaccurate content. In *Kronemyer v.*
21 *Internet Movie Data Base, Inc.*, 150 Cal. App. 4th at 947, the plaintiff claimed that "there was no
22 act in furtherance of free speech ... because respondent [IMDB] did nothing in response to his
23 request to correct the credits" and add him as the producer of the films "My Big Fat Greek
24 Wedding," "Wishcraft," and "Stand and Be Counted." Plaintiff characterized his lawsuit "as
25 based on *inaction* ... rather than conduct or speech." However, the Court rejected this claim
26 because IMDB's decisions of how to list the credits on its Internet site (and whether or not to
27 include plaintiff as a producer) qualified as acts in furtherance of free speech protected under the
28 anti-SLAPP statute. The decision not to list Plaintiff with producer credits for these movies was

1 based on IMDB officials' review of the actual movies themselves, which did not list Kronemyer
 2 as the producer in the opening or closing credits. The Court recognized that a web site could not
 3 be compelled to provide content with errors in it, and that the anti-SLAPP statute was available to
 4 IMDB under these circumstances. *See also Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal.
 5 App. 4th 1050, 1072, 1074 (2005) (applying anti-SLAPP statute in case where plaintiff's Unruh
 6 Act and Section 17200 unfair business practices lawsuit sought to intrude into radio station's
 7 "First Amendment right to control the content of their program" where plaintiff sought to compel
 8 radio station to participate in a radio call-in show).

9 Following *Kronemyer*, just as IMDB had a First Amendment right not to carry content
 10 with errors in it (declining to list Kronemyer as a producer of the three movies on the website
 11 when the movies themselves did not so list Kronemyer), CNN acted in furtherance of its free
 12 speech rights when it decided not to unilaterally use closed captioning technology for Internet
 13 videos that would violate its editorial practices. As the uncontradicted declaration of Clyde D.
 14 Smith makes clear, the current sub-par closed-captioning technology that Plaintiffs seek to
 15 judicially impose on CNN can, under certain conditions, result in inaccuracies, "including
 16 truncated sentences, and lost words (or characters) in some cases." Smith Reply Decl. ¶¶ 8, 10.⁷
 17 Given this uncontested evidence, it cannot reasonably be contended that Plaintiffs' action does not
 18 target CNN's speech.⁸

19 Plaintiffs' lawsuit also would burden CNN's speech in other constitutionally
 20 impermissible ways. CNN is in the highly competitive business of delivering the news on a
 21 timely basis, and Plaintiffs' lawsuit seeks to force CNN alone to use closed captioning technology

22 ⁷ In *Lieberman*, 110 Cal. App. 4th at 166, the court concluded that the conduct "in
 23 furtherance" of speech language means "helping to advance, assisting." Here, CNN's decision
 24 not to unilaterally provide closed captioning with a flawed technology helps to advance and assist
 25 CNN's speech, since it ensures that CNN's speech would not contain inaccuracies that could
 26 mislead the public, including members of plaintiffs' putative class.

27 ⁸ Plaintiffs are wrong to suggest that deaf people do not have access to the news on
 28 CNN.com or that CNN wants to shut out deaf people from its website. Opp. at 28, 30-32. Almost
 every news video available on CNN.com is accompanied by a written news story that parallels the
 content of the video. Declaration of Michael Toppo ¶ 19; Motion at 22. Nor do Plaintiffs dispute
 CNN's history of involvement in industry-wide efforts to make content accessible to everyone.
 9/9/11 Smith Decl. ¶¶ 7-13.

1 that will delay CNN's news delivery and put it at a competitive disadvantage against other news
 2 outlets. 9/9/11 Smith Decl. ¶¶ 13, 23. Plaintiffs also seek to impose production costs on CNN
 3 unilaterally that its competitors would be able to avoid, which would further adversely impact
 4 CNN's speech vis-à-vis its competitors and likely lead to CNN.com posting fewer news videos.
 5 See Toppo Decl. ¶¶ 14, 17-18. Plaintiffs have not disputed – and cannot dispute – CNN's
 6 evidence, which is dispositive of the first prong issue. See Cal. Civ. Pro. Code § 425.16 (b) (2)
 7 (“court shall consider the pleadings . . . [including] opposing affidavits stating the facts upon
 8 which the . . . defense is based.”) (emphasis added).

9 The First Amendment does not allow for the government to unilaterally single out one
 10 news organization with burdensome and financially taxing requirements not imposed on others.
 11 See e.g., *American Broadcasting Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (selectively
 12 excluding ABC from reporting certain campaign events violates First Amendment, which
 13 “requires equal access to all of the media or the rights of the First Amendment no longer would be
 14 tenable”); *Westinghouse Broadcasting v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (same);
 15 *Anderson v. Cryovac*, 805 F.2d 1, 9 (1st Cir. 1986) (discussing the First Amendment dangers of
 16 the government “granting favored treatment to certain members of the media”). When, as here,
 17 freedom of the press and free speech are implicated by the relief sought in a lawsuit, the courts,
 18 mindful of the broad construction rule, have not hesitated to find that the anti-SLAPP statute
 19 applied to the lawsuit, and the Court should do the same here.

20 **3. Plaintiffs Rely On Unpublished, Non-Binding District Court Opinions**
 21 **That Feature Flawed anti-SLAPP Analysis.**

22 In their Opposition and during the December 1, 2011, hearing, Plaintiffs repeatedly cited
 23 to – and this Court frequently referenced – unpublished and non-binding federal district court
 24 decisions as support for Plaintiffs' claim that the anti-SLAPP statute does not apply to this case.
 25 See Opp. at 3, 5 (citing *Doe v. Gangland Prods., Inc.*, 2011 U.S. Dist. LEXIS 89472 (C.D. Cal.
 26 August 1, 2011) and *Duncan v. Cohen*, 2008 U.S. Dist. LEXIS 109342 (N.D. Cal. July 22,

2008)).⁹ As explained in Sections 2.B, 2.C.3, *infra*, these decisions erroneously employed an impermissibly narrow interpretation of the anti-SLAPP statute and imported merits tests into the first prong inquiry that are not appropriate and may only be considered in the second prong.

In *Doe v. Gangland Prods., Inc.*, 2011 U.S. Dist. LEXIS 89472, at *14 (C.D. Cal. August 1, 2011), the court called for other courts to use the “acts in furtherance of” free speech and issue of public interest requirements to limit application of the anti-SLAPP statute. Ignoring binding precedent, the court claimed that a “broad interpretation of the Anti-SLAPP statute” to include all “communicative activity” in furtherance of speech “is contrary to the California legislature’s intent.” *Id.* Clearly, this is wrong.

The decision in *Duncan v. Cohen* is also flawed in many ways, particularly because the Court failed to follow the law of the California Supreme Court regarding the proper test for deciding whether the anti-SLAPP statute applies. In *Duncan*, 2008 U.S. Dist. LEXIS 109342, at *6-*7, the court inquired into Plaintiff’s intent and motives for bringing the lawsuit as part of the first prong inquiry, which is forbidden by *Equilon Enterprises*, 29 Cal. 4th at 67-68. The court also interposed the “public interest” exemption in Code of Civil Procedure Section 425.17 into the first prong test, which is not permissible. *Id.* at *7-*8. See also *Club Members for an Honest Election v. Sierra Club*, 45 Cal. 4th at 316-317.

4. The Cases Where Courts Found That Defendants Did Not Meet The “Arising From” Requirement Did Not Involve A News Organization’s Free Speech Activities.

The cases where courts found that defendants did not comply with the “arising from” requirement share a common link: they did not involve news organizations, and the principal thrust of the lawsuit targeted defendant’s activities that were unconnected to speech or too attenuated from the speech activities for the anti-SLAPP statute to apply. For example, in *Episcopal Church Cases*, 45 Cal. 4th 467, 477-478 (2009), the Court was asked to resolve a

⁹ *Doe v. Gangland Prods.* not only has been appealed to the Ninth Circuit, but also conflicts with another decision handed down a month later finding that the A&E show *Gangland* did come within the anti-SLAPP statute. See *Alexander v. A&E Television Networks, LLC*, 2011 U.S. Dist. LEXIS 99913 (E.D. Cal. September 6, 2011).

1 “*property dispute*” between the Episcopal Church and a breakaway group that was disaffiliating.
 2 *Id.* (emphasis in original). Both sides claimed ownership of the same property, and while
 3 “protected activity may lurk in the background” and explain why the “rift” arose, it could not
 4 “transform a property dispute into a SLAPP suit.” *Id.* Similarly, in *Duncan*, 2008 U.S. Dist.
 5 LEXIS 109342, at *6-*7, the court was called on to resolve a contractual rights and copyright
 6 dispute; the defendant filmmakers did not contend that their rights to copy the copyrighted book
 7 material for a film arose from free speech (it arose from the author’s contract with Sierra Club,
 8 which in turn had contracted out the rights to the defendant filmmakers). Along the same lines,
 9 the courts have rejected attempts to apply the anti-SLAPP statute to “garden variety” legal
 10 malpractice claims where the issue was the attorneys’ negligence in failing to comply with court
 11 orders and discovery statutes, and the lawsuit could not reasonably be said to have arisen from the
 12 “petition” activities of defendants in negligently filing declarations that admitted malpractice.
 13 *See, e.g., Jespersen v. Zubiate-Beauchamp*, 114 Cal. App. 4th 624, 631 (2003). And in the
 14 commercial speech certification case discussed at oral argument and raised by Plaintiffs in their
 15 opposition, the Court found that the underlying activity – the stamping of “OASIS Organic” by
 16 members of the OASIS group – was “to promote the sale of the *product* to which it is affixed,”
 17 and was not in furtherance of contributing to a debate as to what constitutes an organic product.
 18 *All One God Faith, Inc. v. Organic & Sustainable Industry Standards*, 183 Cal. App. 4th 1186,
 19 1204 (2010) (emphasis in original).¹⁰

20 None of these cases are remotely close to the facts of this case. There is no property,
 21 contract, legal malpractice, or certification of commercial products issue at the heart of the
 22 litigation here. There is no dispute that CNN’s expressive content and press rights are at the heart

23
 24 ¹⁰ The central holding of the OASIS Organic certification case is actually about
 25 defendant’s failure to meet the “issue of public interest” requirement. *See All One God Faith,*
 26 *Inc.*, 183 Cal. App. 4th at 1210 (“Because the ‘issue of public interest’ requirement is not met
 27 here, the trial court correctly concluded that section 425.16 does not apply to Dr. Bronner’s cause
 28 of action against OASIS”). The court based its conclusion about the public interest requirement
 on the assertion that stamping the “OASIS Organic” seal on products was more about commercial
 speech promoting OASIS’ members’ business interests rather than the public’s interest in the
 larger issue of organic health and beauty products. *Id.* By contrast, here unquestionably CNN’s
 expressive speech – its news videos – reflects both public issues and issues of public interest.

1 of this lawsuit – Plaintiffs are seeking to compel a leading news organization with millions of
 2 viewers to use closed captioning technology that does not meet the publisher’s editorial standards.
 3 Indisputably, the relief that Plaintiffs ask this Court to impose unconstitutionally burdens CNN’s
 4 speech. Because CNN’s expressive speech and acts in furtherance of that speech are not in the
 5 background but in fact, are at the core of Plaintiffs’ lawsuit, CNN has met the “arising from”
 6 requirement for the anti-SLAPP statute to readily apply.

7 3. CONCLUSION

8 California’s anti-SLAPP statute was intended to be broadly construed, to reach all of the
 9 different forms of conduct in furtherance of speech that Plaintiffs sought to target, regardless of
 10 the label. Plaintiffs’ lawsuit seeks to single out CNN and to judicially compel CNN to publish its
 11 speech in a manner that could cause needless errors (and subject CNN to potential liability) in
 12 violation of its First Amendment rights. This lawsuit thus is subject to the anti-SLAPP statute,
 13 and Plaintiffs are obligated to show a probability of prevailing on their claims – an evidentiary
 14 burden that this Court has already appropriately questioned Plaintiffs’ ability to satisfy. For these
 15 reasons and the reasons delineated in its earlier briefing, CNN respectfully requests that the Court
 16 grant its Special Motion to Strike Plaintiffs’ Complaint.

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