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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

JULIE COLLIER,

Plaintiff and Respondent,

v.

CHRIS KORPI,

Defendant and Appellant.

Appeal from the Superior Court for Orange County
The Honorable John C. Gastelum, Judge
Orange County Superior Court Case No. 30-2012-00609744

AMICUS CURIAE BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT

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INTRODUCTION

Chris Korpi's alleged use of Julie Collier's name to draw interested people to information about a candidate for elective office who he, but not Collier, supported is "conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue" and thus within the protections of the anti-SLAPP statute. Code of Civ. Proc. § 425.16(e)(4). The trial court's decision to the contrary must be reversed.

That Korpi used the Internet, domain names and a web site to communicate his views does not diminish the applicability of the First Amendment. According to Collier's allegations, Korpi's registration of *www.juliecollier.com* and *www.parentsadvocateleague.com* and the direction of these domains to websites operated by Collier's political opponents is functionally the same as shouting, falsely or not, "Julie Collier supports these candidates!" According to Korpi, he was simply saying "Hey Julie Collier supporters! Consider these candidates instead!" Either way, in an offline context, we would immediately recognize that Collier's causes of action arise from Korpi's exercise of his First Amendment rights. Treating Collier's allegation differently because it is aimed at online expression simply ignores the way the Internet works. As the Sixth Circuit has explained, "The rooftops of our past have evolved into the internet domain names of our present. . . . [T]he domain

name is a type of public expression, no different in scope than a billboard or a pulpit[.]" *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003).

Domain names are inherently expressive and are inextricably part of the process of communicating via the World Wide Web. The act of registering a domain name cannot be divorced from the act of publishing information on the Web. It is one seamless publication process, and one that is wholly pure speech.

Moreover, First Amendment protections for domain names and the associated registration, direction, and publication processes are especially enhanced when they are used in the context of a political campaign. As the Supreme Court has repeatedly recognized, "the First Amendment 'has its fullest and most urgent application to speech' uttered during a campaign for political office." *Eu v. San Francisco C'ty Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)); *Burson v. Freeman*, 504 U.S. 191, 196 (1992). "Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party v. White*, 536 U.S. 765, 781 (2002).

Amicus curiae does not here wade into the factual disputes between the parties. Amicus strongly doubts, based on the record, that the direction of *www.juliecollier.com* to Gary Pritchard's

campaign site confused or misled anyone or whether such confusion was Korpi's intent. But the argument presented here does not depend on the resolution of that issue. Even if the facts are exactly as alleged by Collier, and all inferences drawn in her favor, the anti-SLAPP statute should have been applied, and because of the impersonation statutes' unconstitutionality, Korpi's anti-SLAPP motion should have been granted.

INTEREST OF AMICUS CURIAE

The Electronic Frontier Foundation ("EFF") is a member-supported civil liberties organization working to protect free speech and privacy rights in the online world. With more than 20,400 dues-paying members nationwide, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age. EFF is especially concerned about laws and regulations that threaten free expression over the Internet. EFF raised its concerns about section 528.5 when it was first poised for passage, explaining that it might be used to improperly target First Amendment-protected speech, especially in the context of political campaigns and debate.[1] We fear that is precisely what has happened here.

[1] *See* https://www.eff.org/deeplinks/2010/08/e-personation-bill-could-be-used-punish-online.

ARGUMENT

I. THE REGISTRATION AND USE OF A DOMAIN NAME ARE NOT ONLY ACTS IN FURTHERANCE OF THE RIGHT OF FREE SPEECH, THEY ARE THEMSELVES PURE SPEECH

A. DOMAIN NAME REGISTRATION SIMPLIFIES AND FACILITATES THE PUBLICATION OF INFORMATION ON THE INTERNET

Domain names serve an enormously important function in Internet publication: "[U]sers rely on domain names to guide them to websites easily and website creators, in turn, register memorable domain names that they hope will serve as gateways to their content." *See* Jude A. Thomas, *Fifteen Years of Fame: The Declining Relevance of Domain Names in the Enduring Conflict Between Trademark and Free Speech Rights*, 11 J. Marshall Rev. Intell. Prop. L. 1, 8 (2011).

Without domain names, websites would instead be identified by an "arcane . . . [and] rather complicated string of numbers." *Glossary, Domain Name System*, Internet Corp. for Assigned Names and Numbers.[2] Every computer that connects to the Internet is assigned a unique numerical identifier known as an internet protocol ("IP") address. An IP address is a unique number, such as "88.2.174.21," that is assigned to every computer connected to the Internet and functions much like a telephone number for the

[2] *Available at* http://www.icann.org/en/about/learning/glossary#d.

computer to which it is assigned. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 409-410 (2d Cir. 2004).

IP addresses are difficult to remember. So the Domain Name System ("DNS") was developed to associate the numerical IP addresses with more memorable strings of letters and words, that is, domain names. S*ee Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 576 (2d Cir. 2000).

When an Internet user types a domain name into the address box of a web browser or clicks on a hyperlink associated with that domain name, a request is sent to a remote domain name server to query the IP address associated with that domain name. The name server then reports the IP address to the browser and the browser attempts to make a connection to the computer located at that numeric address. Once the domain name is translated into an IP address and the connection is made, web content stored on the remote computer is sent to the user's browser and a web page appears.

1. REGISTRATION OF A DOMAIN NAME IS AN ESSENTIAL STEP IN INTERNET PUBLICATION

The process of registration is a necessary precursor to publishing speech on the Internet in the form of a website. When an individual who wants to register a domain name for personal use,

she must first come up with a unique name or term that she would like to register. In order to register the name successfully, the domain name must not currently be in use by anyone in the world. *See Office Depot Inc. v. Zuccarini*, 596 F.3d 696, 698 (9th Cir. 2010) (citing *Coal. for ICANN Transparency Inc. v. Verisign, Inc.*, 464 F. Supp. 2d 948, 952 (N.D. Cal. 2006)). Once the individual has come up with a name that is unique and available for registration, the individual must submit required information[3] and pay a fee to a domain name registrar.

2. THE DIRECTION OR REDIRECTION OF A DOMAIN NAME TO A WEBSITE IS A VITAL PART OF THE INTERNET PUBLICATION PROCESS

"Direction" or "redirection" is another important part of the Internet publication process. Not every registered domain name

[3] In general, registrants' basic information including name and address is available in a public database known as WHOIS. *See About Whois Search*, Internet Corp. for Assigned Names and Numbers ("ICANN"), *https://www.icann.org/resources/pages/search-2013-03-22-en*. However, registrants who do not wish to have this information publicly available are permitted under ICANN rules to register the domain name through a proxy service. *See About Privacy/Proxy Registration Service*, ICANN, *https://www.icann.org/resources/pages/privacy-proxy-registration-2013-03-22-en*. Individuals may have a wide range of reasons for seeking to register a domain through a proxy, including a desire to publish controversial speech anonymously, a practice that the Supreme Court has recognized is protected by the First Amendment. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

brings a viewer a unique IP address; a single web page might be associated with and pointed to by numerous domain names.

Direction is the process by which a domain name points to the IP address associated with another domain name. Direction can be technically accomplished in a number of ways, the details of which are not pertinent here. With some methods of direction, the visitor is able to see the new domain name in the address bar, and with others, the visitor sees only the domain name she entered.

Direction is an every day occurrence on the Internet and in fact is written into the definitional document for the web.[4] Indeed it is so common that Google provides an instructional video for webmasters on how to use one method of redirection.[5] Indeed, amicus curiae hosts its main website at *www.eff.org*, but has registered the domains *www.eff.com* and *www.eff.net* and directed them to *www.eff.org* in order to make it simpler for visitors to find the website.[6]

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[4] *See Request for Comments: 2616 – Hypertext Transfer Protocol – HTTP/1.1*, Network Working Group, a*vailable at https://tools.ietf.org/html/rfc2616*.

[5] *Change Page URLs with 301 redirects*, Google Webmaster Tools, a*vailable at https://support.google.com/webmasters/answer/93633?hl=en*.

[6] *See also Domain Registration*, HowTo.gov, General Services Administration Office of Citizen Services & Innovative Technologies, a*vailable at http://www.howto.gov/web-content/requirements-and-best-practices/domain-registration* ("Use .gov, .mil, or .fed.us as the official domain name and host content on that official domain. Use other domains (such as .edu, .org, and .com) as

B. THE REGISTRATION AND DIRECTION OF A DOMAIN NAME IS PURE SPEECH INSEPARABLE FROM THE ACT OF PUBLISHING CONTENT ON THE INTERNET

The registration and use of a domain name is pure speech to the same extent that the publication of information on a website is pure speech. The acts of registration and direction are part of the publication process and "cannot be meaningfully separated from the . . . expressive product in terms of the constitutional protection afforded," in the same way that the act of dipping a quill in ink was part of the process of publishing the handwritten word, or the loading of a ribbon was part of the process of publishing the typewritten word. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) (discussing *Hurley v. Irish-Am. Gay Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 568 (1995)).[7]

As the Ninth Circuit explained:

> Neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded. Although writing and painting can be reduced to their

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'aliases,' and use an automatic redirect from the aliases to the official domain.").

[7] It should be beyond question that the domain names at issue in this case, a non-commercial context, are pure speech. The domain names are words, and like other words communicate information. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication."). *See also Taubman Co.*, 319 F.3d at 778 (quoted above).

> constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation. Thus, we have not drawn a hard line between the essays John Peter Zenger published and the act of setting the type. . . . The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds. In other words, we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.

Id. at 1061-62 (internal citations omitted).

It is wrong, therefore, to analyze the registration and direction of a domain name as a form of potentially expressive conduct, rather than pure speech. As the Supreme Court has noted, in regard to the First Amendment protection afforded, "Whether government regulation applies to creating, distributing, or consuming speech makes no difference. " *Brown v. Entm't Merchants Ass'n*, 564 U.S. ___, ___ n.1, 131 S. Ct. 2729, 2734 n.1 (2011). "It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of 'speech' that the First Amendment protects." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). *See also Minneapolis Star & Tribune, Co. v. Minn. Comm'r of Revenue*,

460 U.S. 575, 591 (1983) (striking down Minnesota law that targeted press by imposing special taxes on printing ink).

Thus, First Amendment issues are not analyzed by breaking down the Internet publication process into artificially discreet component parts, any more than they are with the various publishing media that preceded the Internet. *Anderson*, 621 F.3d at 1061-62.

Instead, to answer First Amendment questions regarding an Internet publication, a court must perform a "particularistic, context-sensitive analysis . . . including analyses of the domain name itself, the way the domain name is being used, the motivations of the author of the website in question, the contents of the website, and so on. . . . [T]he appropriate inquiry is one that fully addresses particular circumstances presented with respect to each domain name." *Name.Space*, 202 F.3d at 586.[8] As one district court explained:

[8] *Name.Space* was an antitrust action that challenged the US government's policy of limiting publicly available gTLDs to the original four: .com, .net, .org and .edu. Name.Space, which wanted to provide custom gTLDs, did not purport to assert the First Amendment rights of those who might publish using its custom gTLDs. Rather, it asserted its own First Amendment right to issue the custom gTLDs. The court held that, at that point in time, the four gTLDs by themselves were not expressive because they were merely "three-letter afterthoughts." 202 F.3d at 585. But the court cautioned that in looking at future gTLDs and domain names in general, "we do not preclude the possibility that certain domain names, including new gTLDs, could indeed amount to protected speech. The time may come when new gTLDs could be used for 'an expressive purpose such as commentary, parody, news reporting or criticism,'

> [I]t is impossible to determine whether the content of the website to which the domain name is linked sheds some light on whether the domain name itself communicates any message. Additionally, precisely what motivated plaintiffs' efforts to register the Disapproved Names, or what they intended to do with those domain names once registered, is unclear. They might, for example, have merely sought to obtain those names for resale to others. Alternatively, they might have intended to operate one or more websites (either commercial or private) linked to those names. That, in turn, makes it difficult to discern whether plaintiffs' "speech" should be understood as private or commercial.

National A-1 Advertising, Inc. v. Network Solutions, Inc., 121 F. Supp. 2d 156, 171 (D.N.H. 2000).

As some of the cases cited above indicate, a similar totality-of-the-circumstances-of-publication analysis is used in trademark cases to ensure that First Amendment rights are not infringed. But although the methodology used in those cases is helpful, the holdings are not. Rather, the particular First Amendment questions addressed in those cases are quite different from those at issue in this case. In trademark cases, courts seek to determine whether the domain name itself infringes on the plaintiff's mark. In so doing, the court must first determine whether or not the domain name has a primarily commercial purpose and, if so, then determine whether

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comprising communicative messages by the author and/or operator of the website in order to influence the public's decision to visit that website, or even to disseminate a particular point of view." *Id.* at 586 (quoting *United We Stand Am., Inc. v. United We Stand Am. N. Y., Inc.*, 128 F.3d 86, 93 (2d Cir. 1997)). In such future cases, the totality of the circumstances analysis described above is to be employed. *Id.*

the commercial speech is deceptive or confusing to assess the degree of First Amendment protection due: *commercial* speech deemed confusing or deceptive is not be protected by the First Amendment. *See Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1017 (9th Cir. 2004); *Taubman Co*, 319 F.3d at 774. Neither of those questions need be answered here.[9]

Here, as alleged by Collier, Korpi's registration of the domain names was Korpi's effort to communicate his own political views with Collier's supporters and colleagues. Korpi's act of registration cannot be separated from the act of publication, and Korpi's pure political speech, for purposes of the First Amendment and anti-SLAPP analyses.

C. THE CALIFORNIA ANTI-SLAPP STATUTE INDEPENDENTLY LOOKS TO THE BROAD CONTEXT IN WHICH FIRST AMENDMENT-PROTECTED ACTIVITY OCCURS

This totality of the circumstances analysis described above fits neatly with the anti-SLAPP statute's broad and inclusive[10] definition

[9] Outside of the commercial speech context, there is no requirement that the words communicate a discernible message or advocate a certain position. *See Hurley*, 515 U.S. at 569. So in the present case, it is unnecessary to examine whether the domain name itself is "expressive" or merely a "source locator." Thus, cases such as *Bosley Medical Inst., Inc. v. Kremer,* 403 F.3d 672, 682 (9th Cir.) in which the Ninth Circuit declined to apply the California Anti-SLAPP statute to a trademark infringement action over a domain name, despite recognizing the presence of First Amendment issues, are inapposite.

[10] California law instructs courts to take broad constructions of its provisions in order to protect First amendment rights. *See* Code of

of protected activity, which extends the statute's coverage beyond speech to acts preparatory to speech. The moving party can meet its burden by demonstrating that the cause of action against it was based on any "conduct in *furtherance* of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest." Code of Civ. Proc. § 425.16(e)(4) (emphasis added). These protected acts are "not limited to the exercise of its right of free speech, but to all conduct *in furtherance* of the exercise of the right of free speech in connection with a public issue." *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 166 (2003). The statute thus applies to causes of action based on any act that "helps to advance that right or assists in the exercise of that right." *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 143 (2011) (finding allegedly tortious acts during the casting and general preparation of a television show to be covered by subsection (e)(4)). S*ee also Lieberman*, 110 Cal. App. 4th at 166 ("Furtherance means helping to advance, assisting.").

Thus in *Lieberman*, the court found the first step of the anti-SLAPP analysis was satisfied because the cause of action arose from

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Civ. Proc.§ 425.16, subd. (a) ("The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.") *See also Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106, 1120 (1999).

allegedly unlawful newsgathering and that such newsgathering—surreptitious recording—was essential to reporting. "Reporting the news usually requires the assistance of newsgathering, which therefore can be construed as undertaken *in furtherance* of the news media's right to free speech." 110 Cal. App. 4th at 166. *See also Hunter v. CBS Broad., Inc.*, 221 Cal. App. 4th 1510, 1521 (2013) (applying (e)(4) to television directorial decisions involving whom to place in front of the camera); *Doe v. Gangland Productions, Inc.*, 730 F.3d 946, 953 (9th Cir. 2013) (applying (e)(4) to general investigating, newsgathering, and conducting of interviews).

In the context of the Internet, California courts have held that the maintenance of an online discussion board, including the refusal to delete controversial comments posted there, are covered by the anti-SLAPP statute through subsection (e)(4). *See Hupp v. Freedom Communications, Inc.*, 221 Cal. App. 4th 398, 405 (2013).

The processes of registering and directing a domain are essential steps in Internet publication; these acts are thus themselves pure speech. But even if they were not, they are clearly "acts in furtherance" of Internet publication, an act that all agree is protected by the First Amendment. Defendant has thus met his burden of demonstrating the anti-SLAPP statute applies.

II. THE *FLATLEY* EXCEPTION CANNOT APPLY BECAUSE THE STATUTES PURPORTEDLY CRIMINALIZING KORPI'S SPEECH ARE UNCONSTITUTIONAL OR, AT A MINIMUM, SUBJECT TO CONSTITUTIONAL DEFENSES

An exception to the anti-SLAPP statute exists whereby even if the cause of action is based on "acts in furtherance of the right of free speech," the anti-SLAPP statute will nonetheless not apply if acts are "conclusively demonstrated to have been illegal as a matter of law." *Flatley v. Mauro*, 39 Cal. 4th 299, 320 (2006). However, the exception does not apply if the illegality of the acts is disputed. *See Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 683-84 (2012) ("The charge of illegality necessarily implicates the subordinate issue of whether the law relied upon to assert that the speech was 'illegal as a matter of law' . . . could be constitutionally imposed to criminalize [the defendant's] speech."). In that situation, the illegality of the defendant's conduct is part of the plaintiff's burden to show a probability of prevailing on the merits, the second prong of the anti-SLAPP analysis. *Id.* at 681 (finding the *Flatley* exception did not apply when there was a valid constitutional challenge to the application of the statute).

The exception does not apply here because the laws at issue are unconstitutional, or at a minimum, subject to constitutional defenses. Penal Code sections 528.5 and 529(a)(3) facially violate the First Amendment because they are each content-based restrictions

on speech that are vague and overbroad and fail to meet strict scrutiny. And even if the laws are not facially unconstitutional, they cannot be constitutionally applied to all acts of impersonation defined in the statutes. Each statute by its language reaches protected speech, such as political satire and commentary. An act cannot be considered "illegal as a matter of law" when a constitutional defense is available. Rather, as stated above, the validity of that defense must be assessed in the second prong of the anti-SLAPP analysis.

As a result, Korpi's acts from which Collier's causes of action arise cannot be deemed "illegal as a matter of law."

A. IMPERSONATION IS NOT A CATEGORY OF SPEECH EXEMPT FROM THE FIRST AMENDMENT

Impersonation is not a category of speech exempted from the First Amendment. Collier's assertion to the contrary is simply incorrect. Indeed, in *United States v. Alvarez*, ___ U.S. ___, ___, 132 S. Ct. 2537, 2544 (2012), the Supreme Court, rejecting the contention that false speech was categorically excluded from the First Amendment, struck down an impersonation law, the Stolen Valor Act, as unconstitutional.

As the Supreme Court explained, there are certain "historic and traditional" categories of speech that are considered to be outside of the protections of the First Amendment: obscenity,

defamation, commercial fraud, incitement, child pornography, fighting words, true threats, speech integral to criminal conduct, and speech presenting some grave and imminent threat the government has the power to prevent. *Alvarez*, 132 S. Ct. at 2544. This list is fairly fixed; although there is a possibility that other categories exist, any newly recognized category must have a strong and consistent history of being unprotected. *Brown*, 131 S. Ct. at 2734; *United States v. Stevens*, 559 U.S. 460, 469-71 (2010).

Impersonation is not among these categories of unprotected speech. *Alvarez*, 132 S. Ct. at 2544-45 ("This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation."). As the Court explained, the government is not permitted "to compile a list of subjects about which false statements are punishable." *Id.* at 2547. Even the dissenting justices agreed that laws proscribing false statements about "matters of public concern" would "open[] the door for the state to use its power for political ends" creating a "potential for abuse of power" "simply too great" for the First Amendment to tolerate. *Id.* at 2564 (Alito, J., dissenting). *See also 281 Care Comm. v. Arneson*, 638 F.3d 621, 633, 635 (8th Cir. 2011) (rejecting contention that knowingly false speech is categorically exempt from the First Amendment);

State Pub. Disclosure Comm'n v. 119 Vote No! Comm., 135 Wash.2d 618, 627-28 (1998) (same).

Such a categorical exemption would be especially inappropriate when applied in the context of political speech. *Alvarez*, 132 S. Ct. at 2555; *281 Care Comm.*, 638 F.3d at 635-36.[11]

Rather, impersonation laws, like other restrictions on protected speech, must be individually analyzed to see if they survive the appropriate First Amendment scrutiny. *See Alvarez*, 132 S. Ct. at 2548.

Penal Code sections 528.5 and 529(a)(3) and Business & Professions Code section 17525 cannot survive such scrutiny.

B. THE STATUTES ARE UNCONSTITUTIONAL

1. PENAL CODE SECTION 528.5 IS UNCONSTITUTIONAL BECAUSE IT LACKS THE REQUIRED INTENT ELEMENT

At a minimum, the First Amendment requires that any statute criminalizing false speech about public figures require that the speaker (1) know that the statement was false and (2) intend that others believe the statement to be true. *See Summit Bank*, 206 Cal.

[11] A case currently under submission may present the Court with the opportunity to expound on the issue of whether a statute prohibiting false statements made during the course of a political campaign survives constitutional scrutiny. *Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415 (6th Cir. 2013), *cert. granted*, 134 S. Ct. 895 (2014). The grant of certiorari in the case focused on justiciability issues. But the underlying case involves a constitutional challenge to an Ohio law that regulates false and misleading political statements. *Id.*

App. 4th at 686-87, 690 (striking down Cal. Fin. Code section 1327 as unconstitutional because "[t]he absence of any requirement that the person making the statement either know that it is false or, at a minimum, acted with reckless disregard of its truth or falsity, is a fundamental constitutional defect."). *See also New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964) (requiring showing of actual knowledge of falsity in defamation actions by public figures*); Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (requiring intent for audience to believe falsity in claims for intentional infliction of emotional distress against public figures*); Virginia v. Black*, 538 U.S. 343, 366-67 (2003) (holding that the First Amendment does not allow a prima facie presumption of specific intent) (O'Connor, J., for plurality).

Section 528.5 does not require intent in this way. Rather, section 528.5 requires only that the publisher "knowingly . . . credibly impersonate" another person. Because an impersonation is "credible" if "another person would reasonably believe . . . that the defendant was or is the person who was impersonated," liability turns not on actual, subjective intent to impersonate, but on objective, should-have-known, intent. The statute only requires that the impersonator's actions be "knowing," that is, purposeful; it does not clearly require that the impersonator have intended those actions to deceive. *See Summit Bank*, 206 Cal. App. 4th at 687 & n.8

(rejecting the argument that the requirement that the false statement be "willfully and knowingly made" required that the speaker actually know the statute was false).

Section 528.5 is thus facially unconstitutional.[12]

2. PENAL CODE SECTIONS 528.5 AND 529(a)(3) ARE ALSO UNCONSTITUTIONALLY VAGUE

A statute is unconstitutionally vague for First Amendment purposes if it "exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the prosecuted conduct." *Summit Bank*, 206 Cal. App. 4th at 688 (quoting *Rowan v. Post Office Dept.*, 397 U.S. 728, 740 (1970)). This concern is enhanced when a statute imposes criminal penalties on speech. *Id. See also People v. Mirmirani*, 30 Cal. 3d 375, 387 (1981) (striking down criminal threat statute as unconstitutionally vague).

Section 528.5 is unconstitutionally vague for several reasons. As discussed above, the statute is unclear as to whether the impersonator must have intended to deceive anyone. But more egregiously, the statute imposes liability if the impersonator has the purpose of "harming . . . another person." "Harming" has no legal definition. It could include hurting one's feelings, exposing one to

[12] The California Supreme Court has read an intent requirement into section 529, which is otherwise silent on the issue. *People v. Rathert*, 24 Cal. 4th 200, 208 (2000). However, it is unclear whether the Court required an intent to impersonate or an intent to deceive. *Compare id.* at 208 *with id.* at 217 (Brown, J., concurring). B&P section 17525 requires "bad faith intent" which is defined in section 17526.

mild ridicule, or diminishing one's political influence. A speaker is left to guess as to which of his "purposes" will run afoul of the law.

Section 529(a)(3) suffers from a mirror-image infirmity: that statute imposes liability if one falsely personates another and then, inter alia, "does any act . . . whereby any benefit might accrue to the party personating, or to any other person." Cal. Penal Code § 529. "Benefit" is as vague as "harming": this clause thus brings a seemingly limitless spectrum of conduct in within the statute's prohibition.

3. SECTIONS 528.5, 529(a)(3) AND 17525 ARE UNCONSTITUTIONALLY OVERBROAD

For similar reasons, sections 528.5, 529(a)(3) and 17525 are also unconstitutionally overbroad. A statute is overbroad if it is subject to a substantial number of applications that would be prohibited by the First Amendment. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Summit Bank,* 206 Cal. App. 4th at 690. As with vagueness, criminal statutes must be scrutinized with special care for overbreadth. *Houston v. Hill*, 482 U.S. 451, 459 (1987).

Each section "draws within its ambit" a host of constitutionally protected speech. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Summit Bank*, 206 Cal. App. 4th at 690.

First, each statute criminalizes speech that does no harm. Section 528.5 requires only a purpose of harming, not that any harm

actually result. Indeed, the statute does not even require that anyone have been deceived. The impersonation is deemed "credible" if "another person would reasonably believe" that the defendant was the person who claims to have been impersonated. Penal Code § 528.5. Section 529(a)(3) criminalizes speech that "whereby any benefit might accrue" to a person, without requiring either that any other person actually benefit or that any person actually be harmed. Penal Code § 529(a)(3). Section 17525 has no harm requirement at all. The First Amendment prohibits the imposition of liability without harm for statements made about public figures or matters of public concern. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (barring recovery of presumed damages in public issue defamation cases). The statutes are thus overbroad by including harmless speech within their prohibitions.

Second, because "harmful" purpose is not defined in section 528.5 and "benefit" is not defined in section 529(a)(3), each statute could be applied in a host of contexts in which the speech would be protected by the First Amendment. *See Alvarez*, 132 S. Ct. at 2547 (identifying constitutional defect in the fact that the statute barred falsities "without regard to whether the lie was made for the purpose of material gain"). For example, each law could be applied to satirists and protestors who momentarily imitate a person in order to poke slight fun at them, call them out on their hypocrisy, *see*

Hustler, 485 U.S. at 53, comment on their political positions, and for many other purposes that the impersonated person might find "harmful." *See R.A.V. v. St.Paul*, 505 U.S. 377, 414 (1992) (White, J., concurring) (finding law overbroad because it did not exclude actions based on harms such as "hurt feelings, offense, or resentment"). Impersonation of political figures, celebrities and others holding positions of power and influence, from Will Rogers's Calvin Coolidge to Vaughan Meader's John F. Kennedy to Dana Carvey's George H.W. Bush, is a time-honored tradition in the United States, making significant contributions to our political discourse. *See generally* Peter Robinson, *The Dance of the Comedians: The People, the President, and the Performance of Political Standup Comedy in America*, (Univ. of Mass. Press, 2012).

And many impersonations rely on the audience at least temporarily falling for the impersonation. For example, a group of political activists known as "the Yes Men" engage in a form of satire they call "identity correction," posing as business and government representatives and making statements on their behalf to raise popular awareness of the real effects of those entities' activities. In 1999, the Yes Men created a website parodying then-Texas Gov.

George W. Bush's political campaign.[13] In August 2006, the Yes Men appeared at a conference in New Orleans, and posing as a representative from the United States Department of Housing and Urban Development, promised to reopen closed public housing units rather than tear them down.[14] In June 2007, the Yes Men posed as Exxon Mobil and National Petroleum Council representatives at a Canadian oil conference to propose that the oil industry use dying humans to produce needed oil.[15]

Other examples abound. In the 1990s, "Billionaires for Bush," a "grassroots network of corporate lobbyists, decadent heiresses, Halliburton CEOs, and other winners under George W. Bush's economic policies" sponsored several political pranks wherein members, posing as wealthy conservatives, commented on the influence of "big money" on politics.[16] Among other things, the group organized a "Million Billionaires March" in conjunction with

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[13] Terry M. Neal, *Satirical Website Poses Political Test*, Wash. Post. (Nov. 29, 1999), available at *http://www.washingtonpost.com/wp-srv/WPcap/1999-11/29/002r-112999-idx.html* (visited May 22, 2014).

[14] *See* CNN.com, Oops: Impostor scams Louisiana officials, (Aug. 28, 2006), available at *http://www.cnn.com/2006/POLITICS/08/28/hud.hoax/index.html* (visited May 22, 2014).

[15] Gar Smith, *Tapping the fat of the land*, SFGate.com, (July 1, 2008), available at *http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/06/30/EDNR11F05I.DTL* (visited May 22, 2014).

[16] *See* Dana DiFilippo, *Funny Way to Run a Protest*, Philadelphia Daily News, July 29, 2000; Jack Hitt, *Birth of the Meta-Protest Rally?*, New York Times (March 28, 2004), *available at http://www.nytimes.com/2004/03/28/magazine/28ENCOUNTER.html* (visited May 22, 2014).

the 2004 Democratic National Convention in which 150 marchers presented a fake check for the amount of "whatever it takes" to the local offices of the Republican Party, purportedly to help the effort to re-elect George Bush.[17]

The statutes potentially criminalize these kinds of activities if they happen to implicate real people as long as a reasonable person would have been momentarily deceived, even if the impersonators quickly reveal their ruses, and no "harm" results, as long as the impersonator had some form of "harm" as her purpose, or received some benefit—laughter perhaps?—from the momentary deception.

4. THE STATUTES ARE CONTENT-BASED RESTRICTIONS ON SPEECH THAT FAIL STRICT SCRUTINY

Each statute imposes a differential burden on speech based on the content of that speech, namely, the use of another's name. Each is thus content-based. Indeed, courts have consistently found that laws criminalizing non-commercial falsities to be content-based. *See Alvarez*, 132 S. Ct. at 2544-45, 2548 (assessing the Stolen Valor Act as a "content-based restriction"); *281 Care Comm*, 638 F.3d at 635 (holding that a Minnesota law criminalizing the dissemination of

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[17] Simon Vozick-Levinson, *'Wealthy' Protesters Make Case Outside DNC*, The Harvard Crimson, (July 30, 2004), *available at* http://www.thecrimson.com/article/2004/7/30/wealthy-protesters-make-case-outside-dnc/.
See generally https://www.billionairesforbush.com; *https://en.wikipedia.org/wiki/Billionaires_for_Bush.*

knowingly false statements about a ballot initiative to be content based and remanding so that district court could perform strict scrutiny analysis); *Summit Bank*, 206 Cal. App. 4th at 691 (finding that Cal. Fin. Code section 1327, which imposed criminal liability when a derogatory and false statement was made about a bank's financial condition, was a content-based restriction on speech subject to strict scrutiny).

Each law is also content-based because each prohibits speech in order to prevent "certain reactions from the listener." *See Summit Bank*, 206 Cal. App. 4th at 692. That is, the laws aim to address the communicative impacts of the speech prohibited, s*ee Texas v. Johnson*, 491 U.S. 397, 407 (1989), namely the confusion experienced by the audience or the offense felt by the person impersonated.

Content-based laws are presumptively unconstitutional and must survive strict scrutiny. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004); *Summit Bank*, 206 Cal. App. 4th at 691. To survive strict scrutiny a law must be "necessary to serve a compelling state interest and . . . narrowly tailored to achieve that interest. *Summit Bank*, 206 Cal. App. 4th at 691. A law is "narrowly tailored" if it (1) materially and directly advances the governmental interest, *see, e.g.*, *Eu*, 489 U.S. at 226, 228-29; (2) is not overinclusive, *see, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120-21 (1991); (3) is not underinclusive, *see*, *e.g., Florida Star v.*

B.J.F., 491 U.S. 524, 540 (1989); and (4) is the least speech-restrictive means available to address the governmental interest. *Id.* at 541.

Each law fails strict scrutiny because each is overinclusive for the same reasons that each is overbroad: as described above, each applies to numerous situations in which the action is constitutionally protected. Thus even if the number of improper applications are not substantial enough to render the statute facially overbroad, they nevertheless are sufficiently numerous to render the laws inadequately tailored.

Sections 528.5 and 17525 also fail strict scrutiny because an obvious less restrictive means is available for addressing the harm sought to be prevented: counter-speech, that is, the impersonated person's ability to disavow the website attributed to her. The availability of counterspeech as a remedy for harmful false speech was one of the reasons the Supreme Court in *Alvarez* found that the Stolen Valor act failed strict scrutiny. *Alvarez*, 132 S. Ct. at 2549. As the Court explained, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Id.* at 2550.

C. THE *FLATLEY* EXCEPTION CANNOT APPLY WHERE CRIMINAL LAW IS SUBJECT TO CONSITTUIONAL DEFENSES

Even if the laws are not facially unconstitutional, each is certainly subject to constitutional defenses and unconstitutional applications. Unless the moving party affirmatively foreswears such defenses, and the anti-SLAPP statute would otherwise cover the cause of action, the *Flatley* exception cannot apply. *Summit Bank*, 206 Cal. App. 4th at 683-84. Rather the legality of the moving party's conduct must be examined in the second part of the anti-SLAPP analysis in which the prima facie merits of the plaintiff's case is at issue. In such situations, the plaintiff cannot defeat a SLAPP motion merely by claiming that the conduct in question is illegal under the language of the statute.

Here, Korpi has asserted that the laws cannot be constitutionally applied to his actions. Under a proper anti-SLAPP analysis, it is Collier's burden to prove that they can be.

III. BECAUSE THE STATUTES ARE UNCONSTITUTIONAL, THE ANTI-SLAPP MOTION SHOULD BE GRANTED

Although this court could remand this action to the trial court to perform the second step of the anti-SLAPP analysis, to do so here is unnecessary. As stated above and in Korpi's briefs, the two statutes under which Collier seeks relief, Penal Code section 528.5 and Business & Professions Code section 17525, are unconstitutional.

Collier will thus not be able to demonstrate the minimum level of merit necessary to carry her burden under the second step of the anti-SLAPP analysis.

CONCLUSION

Domain names are an integral part of Internet publication. The registration of a domain name is thus pure speech, and is undeniably an act in furtherance of the exercise of First Amendment rights. The anti-SLAPP statute thus applies, and the burden should have shifted to Collier to prove that her causes of action were not defective as a matter of law and were supported by minimal evidence. The trial court erred by ruling otherwise and should be reversed.

Dated: May 27, 2014 Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(l))

The text of this brief consists of 6,716 words as counted by the Microsoft Word for Mac 2011 word-processing program used to generate this brief.

Dated: May 27, 2014

Andrew Crocker

CERTIFICATE OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 815 Eddy Street, San Francisco, California 94109. My email address is steph@eff.org.

On May 27, 2014, I served the foregoing document, *AMICUS CURIAE* BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT on all interested parties in said action in the manner indicated on the attached service list and as set forth below:

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

Executed on May 27, 2014 at San Francisco, California.

Stephanie Shattuck

Collier v. Korpi
Court of Appeal Case No. G048735

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