

NO. S260736

IN THE
SUPREME COURT OF CALIFORNIA

VERA SEROVA,
Plaintiff / Respondent,

v.

SONY MUSIC ENTERTAINMENT *et. al,*
Defendant / Appellant.

Court of Appeal, Second Appellate District, Division 2
Case No. B280526
Los Angeles County Superior Court
Case No. BC548468
Hon. Ann I. Jones

**APPLICATION TO FILE BRIEF AND AMICUS CURIAE BRIEF OF
THE LOS ANGELES CITY ATTORNEY IN SUPPORT OF
PLAINTIFF AND RESPONDENT**

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APPLICATION TO FILE BRIEF AS AMICI CURIAE

Pursuant to California Rules of Court, rule 8.520(f), the Los Angeles City Attorney respectfully requests permission to file the attached brief as *amicus curiae* in support of Respondent Vera Serova and to join in the arguments made by the California Attorney General in his own *amicus* brief.

This application is timely made within the extension granted by the Court on December 22, 2020. No party or counsel for any party in the pending appeal authored the proposed *amicus* brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the *amicus curiae*, its members, or its counsel in the pending appeal.

I. INTEREST OF AMICUS CURIAE

Amicus curiae Los Angeles City Attorney Michael N. Feuer enforces California's Unfair Competition Law and False Advertising Law on behalf of the four million residents of Los Angeles and the People of the State of California. The Los Angeles City Attorney litigates these cases throughout California and across the United States on behalf of consumers. He presents this *amicus* brief to affirm the previously well-settled nationwide distinctions between regulation of commercial and

noncommercial speech under the First Amendment of the United States Constitution, particularly as this distinction impacts the effective enforcement of California's Unfair Competition Law and False Advertising Law.

II. NEED FOR FURTHER BRIEFING

The proposed *amicus curiae* proposes that further briefing will be helpful to explore matters not fully addressed by the parties' briefs, particularly the widespread scope of application of traditional First Amendment commercial speech doctrine and its relevance to California's consumer protection laws, including California's Unfair Competition Law and False Advertising Law. With his experience and responsibility to enforce California's Unfair Competition Law and False Advertising Law, the Los Angeles City Attorney can provide a valuable perspective that may substantially add to the Court's analysis.

The ongoing pandemic highlights the important role that consumer protection laws play not only in fair competition and economic marketplace regulation but also in protecting public health. The marketplace is now rife with new frauds and scams related to falsely advertised, fraudulent, unapproved, and unproven COVID vaccines, testing processes, and cures and treatments. Should this Court affirm the Second Appellate District's significant expansion of noncommercial speech in their *Serova* opinion, the Los Angeles City Attorney is concerned that his ability to use California's

consumer protection laws to protect the public from public health frauds will be significantly curtailed, with real dangers for the public health of the residents of Los Angeles and the People of the State of California.

III. CONCLUSION

For the foregoing reasons, the Los Angeles City Attorney respectfully requests that the Court accept the accompanying brief for filing in this case.

Dated: February 12, 2021

Respectfully submitted,

By: /s/Miguel J. Ruiz
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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Michael N. Feuer, the Los Angeles City Attorney, has no parent corporation, issues no stock, and therefore no publicly-held corporation owns 10% or more of any such stock.

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Los Angeles City Attorney Michael N. Feuer

enforces consumer protection laws on behalf of Los Angeles’s four million residents and the People of the State of California. The Los Angeles City Attorney prosecutes these cases in courts throughout the State of California and across the United States on behalf of these consumers.

He appears in this appeal to emphasize the importance of the well-settled commercial speech doctrine under the First Amendment of the United States Constitution as it impacts California’s Unfair Competition Law and False Advertising Law. For any defendant who disclaims personal knowledge of a factual matter regarding a matter of public controversy or concern, *Serova* provides a potential safe harbor in a “guise of opinion” defense for false advertising statements that purport to be factual; it creates an incentive to avoid learning facts, and then simply stating the facts the speaker wishes were true as a noncommercial speech “opinion.” It is hard to see how modern consumer protection laws, which have largely set aside common law scienter requirements, could ever prevail if false statements could simply be recast as protected “opinion” speech under the First Amendment, however demonstrably false.

¹ This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

The Los Angeles City Attorney submits this amicus brief to address the second issue² presented in this appeal: “For purposes of liability under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.),” do “representations a seller made about a creative product on the product packaging and in advertisements” “constitute commercial speech, and does it matter if the seller lacked personal knowledge that the representations were false? (See *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939.)” (OBM 6.)

This is an important issue to the Los Angeles City Attorney. One of his key missions is to protect the residents of Los Angeles and to ensure that consumers receive true and accurate information in the marketplace through successful and effective prosecution of consumer fraud using the California Unfair Competition Law, codified at Business and Professions Code, section 17200 (“Unfair Competition Law” or “UCL”) and the False Advertising Law, codified at Business and Professions Code, section 17500 (“False Advertising Law” or “FAL”). These consumer protection laws generally require businesses and advertisers to avoid false statements, either as a matter of strict liability³ or under “know or should have known”

² Like the Attorney General, the Los Angeles City Attorney does not address the anti-SLAPP issue because it is inapplicable to public prosecutions. (Code Civ. Proc. § 415.16, subd. (d).)

³ See Bus. & Prof. Code § 17200; see also *State Farm Fire & Casualty Co.*

negligence standards.⁴ Thus, the correct application of commercial speech doctrine in the context of consumer protection prosecutions not only helps make marketplaces more fair and with less risk of fraud for consumers and business competitors, but in the ongoing context of the COVID pandemic, commercial speech in the marketplace is also speech that goes directly to questions of public health—to matters which can be the difference between health and illness, and especially for more vulnerable populations, life and death. Consumers must have the most accurate and truthful possible information available concerning anti-COVID measures such as vaccines, treatments, protective equipment, and disinfectants, in order to protect themselves, their families, their livelihoods, and their communities.

ARGUMENT

The Los Angeles City Attorney hereby joins the arguments presented in the Attorney General’s well-reasoned *amicus curiae* brief.

As a brief further argument, the Los Angeles City Attorney would emphasize the importance of stability and predictability in the application of the distinctions between “commercial” and “noncommercial” speech under well-settled First Amendment commercial speech doctrine. These

v. Superior Court (1996) 45 Cal.App.4th 1093, 1102 (“The statute imposes strict liability. It is not necessary to show that the defendant intended to injure anyone.”).

⁴ *See* Bus. & Prof. Code § 17500 (“which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading”).

distinctions are consistently applied nationwide, by federal, state, and local prosecutors, to enforce false advertising laws, mini-FTC Acts, and other consumer protection laws.

Truthful and accurate advertising and marketing requirements and disclosures are a pillar of modern consumer protection laws; if a seller must tell the truth at the outset, then they are less likely to dupe the unwary buyer. But if advertisers and sellers now gain the ability, under the current *Serova* opinion, to offer a defense that an otherwise demonstrably false factual statement, that for some reason is “unknown” to the advertiser, can become a matter of “opinion,” then many modern consumer protection prosecutions will be cut short. This brief will focus on recent, real world applications of the commercial speech distinction and offer a few key examples of the importance of effective consumer protection laws as a matter of public policy, especially given the current ongoing pandemic.

Given the scams the Los Angeles City Attorney has prosecuted during the COVID-19 pandemic, such concerns are not hypothetical but could translate into real physical harm to the consumers. For the reasons argued by the Attorney General and as set forth below, this Court should apply its prior precedents and reverse the decision of the Second Appellate District.

I. ECONOMICALLY MOTIVATED SPEECH IS COMMERCIAL SPEECH

The appellate court concluded, after conceding that Sony's statements meet *Kasky*'s first two tests for commercial speech, that because the statements "concerned a publicly disputed issue about which [Sony] had no personal knowledge" and "the statements were directly connected to music that itself enjoyed full protection under the First Amendment," the statements were "noncommercial." (*Serova v. Sony Music Entertainment* (2020) 44 Cal.App.5th 103, 126 (*Serova*)). Without this determination that the speech was noncommercial and based on the agreement of the parties for purposes of this appeal, Sony's promotion of the album *Michael* must violate at least California's Unfair Competition Law as a matter of law. As agreed by the parties, Sony marketed *Michael* as "a brand new album from the greatest artist of all time," (POB at p. 12) with "9 previously unreleased vocal tracks performed by Michael Jackson"⁵ (POB at p. 14). But for purposes of this appeal, three of the nine songs were not sung by Michael Jackson (and Sony has made advertising statements that were literally untrue or misleading and has therefore violated California's consumer protection laws.⁶

⁵ The tenth track on the album was previously released in 2004. (POB at p. 12, fn. 1.)

⁶ See, *supra*, notes 3 & 4.

The Los Angeles City Attorney adopts all the arguments of the Attorney General as to why Sony’s claims concerning the album (including the album cover) are better analyzed as core commercial speech—marketing materials and product promotion designed at least in part, to sell albums. (See Brief of *Amicus Curiae* the Attorney General (“AG Amicus Brief”) at pp. 32-63.)

II. RECENT APPLICATIONS OF CONSUMER PROTECTION LAWS CONFIRM THE IMPORTANCE OF THE CORE DISTINCTIONS BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH.

Consumer protection laws in California are intentionally broad, easily extending to cover “artistic” matters such as factual identification of artists on album covers and “scientific” issues such as fake coronavirus cures.⁷ Notably, both artistic and scientific issues are routinely subject to public controversies, so the danger, from the perspective of the Los Angeles City Attorney, can easily fall into *Serova*’s formulation that an unverified factual assertion about a matter of public interest is a

⁷ *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181, citing *American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 698 (“The unfair competition law has a broader scope for a reason. The Legislature intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive.” (cleaned up)).

noncommercial “opinion” beyond the reach of unfair competition or false advertising laws.

This is not an academic or hypothetical concern. As the most prominent example, consumer confusion regarding the coronavirus pandemic has been a boon for scam artists.⁸ The Los Angeles City Attorney has been at the forefront of combatting COVID-19 fraud, securing judgments against distributors of unauthorized or fake at-home COVID-19 test kits,⁹ fake COVID-19 disinfectants,¹⁰ miracle COVID-19 cures¹¹ and prosecuting numerous pandemic price-gouging cases regarding personal protective equipment, such as surgical masks and hand sanitizers. The Los Angeles City Attorney is in active litigation on additional matters, all of which involve alleged COVID-19 frauds and false advertising or false or misleading statement claims.

If producers of these fake COVID-19 test kits, fake disinfectants, and “miracle” cures can rely on *Serova* as a basis to claim a First

⁸ See e.g., “We live in a golden age of scams amid coronavirus pandemic” available at <https://www.latimes.com/business/story/2021-02-09/column-pandemic-scams> (accessed February 11, 2021).

⁹ See e.g., *People v. Yikon Genomics, et al.*, Case No. 20STCV13169 (LA Sup. Ct. Apr. 3, 2020); *People v. RootMD, Inc.*, Case No. 20STCV15190 (LA Sup. Ct. Apr. 21, 2020); *People v. Applied BioScience Corp.*, Case No. 20STCV16600 (LA Sup. Ct. Apr. 30, 2020).

¹⁰ See *People v. Wellness Matrix Group, Inc.*, Case No. 20STCV19955 (LA Sup. Ct. May 26, 2020).

¹¹ See *People v. KNature Co., Inc.*, Case No. 20STCV18300 (LA Sup. Ct. May 13, 2020).

Amendment defense or a lack of personal knowledge as to the efficacy of their products, by simply stating that it's a matter of "opinion" regarding a matter of public concern whether their product works, then it's not just the consumers who suffer. People who rely on a fake at-home COVID-19 test kit may decide to visit older relatives based on a false negative test, potentially spreading COVID-19 to those most vulnerable to the virus. People who ingest radish paste as a "cure" for COVID-19 may delay seeking actual medical treatment and expose others, leading to worse health outcomes.

The Los Angeles City Attorney has relied on both state and federal drug and medical device regulations to determine whether a purported drug can be advertised with a claim that it is a "cure or treatment" for coronavirus, or whether a test kit is approved by the Food and Drug Administration. Food and drugs are areas where speech is tightly regulated to avoid consumer harm. For example, the federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 *et seq.*) and California's Sherman Food, Drug, and Cosmetic Law, Health and Safety Code section 109875 *et seq.* ("Sherman Law") set forth the approval, labeling, marketing, and sale of drugs and medical devices in California. But under *Serova*, for example, there is a concern that if someone wanted to introduce a new, false coronavirus cure, they could simply claim their "recipe" for the product reflects core artistic speech expression and they are selling their product

based on an unsupported “opinion” of the efficacy of their new, untested compounds for the “cure or treatment” of coronavirus as well as other diseases.

Similarly, the federal Environmental Protection Agency and the California Department of Pesticide Registration regulate the marketing and sale of disinfectant products designed to mitigate the spread of coronaviruses. Disinfectants, by definition, are designed to neutralize, incapacitate, or kill living things—hopefully only harmful microorganisms. But again, there is a real danger that *Serova* creates a novel defense that the First Amendment allows sellers to market and advertise their unapproved products—products that are by definition harmful—based on unsupported opinion.

Allowing businesses to subvert this requirement by freely substituting unsupported “opinion” under the guise of fact (by avoiding knowledge of the actual facts) would not benefit consumers or be fair to more scrupulous competitors who take care to make truthful advertising factual statements—it would instead mark a return to the 19th Century “patent medicine” era of phony cures. (*See generally* AG Amicus Brief at p. 19 (describing historic era of unapproved, dangerous medicines peddled to unsuspecting consumers).) But this is the novel interpretation of commercial speech at *Serova*’s core: unknown or unsubstantiated “facts” concerning matters of public concern, such as the COVID-19 pandemic, are

transformed into opinions, and are thus noncommercial speech enjoying far greater protections than commercial speech. (*Serova* at 128 [“Because [Sony lacked actual knowledge . . . [Sony’s] representations about the identity of the singer amounted to a statement of opinion rather than fact.”].)

Given the multiple scams and frauds the Los Angeles City Attorney has prosecuted during the pandemic, such concerns could translate into real physical harm to consumers seeking relief and protection from COVID-19. There is no dispute that the pandemic is a matter of public concern.

For example, in the case of the People’s recent prosecution of KNature for its \$100 per-jar radish paste which was advertised as a cure or treatment for coronavirus, the defendant offered no defense that it had scientifically substantiated evidence that its radish recipe could actually cure COVID-19.¹² In *KNature*, the defendant readily stipulated to a preliminary injunction halting its false advertising of its radish paste as a cure or treatment for coronavirus. If this Court affirms the *Serova* decision, future defendants selling similar products may argue that although they didn’t definitively know whether their products cured COVID-19, their “opinion,” on a matter of public concern, was that it did, and that such false claims under *Serova* are protected by the First Amendment. This could set

¹² *People v. KNature Co., Inc.*, Case No. 20STCV18300 (LA Sup. Ct., filed May 13, 2020, and stipulated preliminary injunction filed May 18, 2020).

a dangerous precedent where defendants may argue that their false claims made in connection with the sale of highly regulated food and drug products are allowed because it is their “opinion” that they work even when such an opinion is unsupported.

As another example, in the recent case of *People v. Rainbow Light*, the Los Angeles City Attorney secured a judgment, including a permanent injunction, against a prenatal vitamin manufacturer and seller.¹³ In that case, the People alleged that Rainbow Light had violated the Unfair Competition Law and the False Advertising Law by falsely advertising that its prenatal vitamin supplements were “free of heavy metals” and contained the “lowest detectable” amounts of lead, as compared to other brands. There is no known safe amount of lead for the neurodevelopment of babies and growing children. The People asked Rainbow Light to substantiate their scientific and factual claims under Business and Professions Code section 17508, and alleged that Rainbow Light’s prenatal vitamins did, in fact contain heavy metals, making their advertising literally false.

As part of its settlement with the Los Angeles City Attorney, Rainbow Light agreed to resource their prenatal vitamins and offer full consumer restitution, as well as pay civil penalties. But if the *Serova*

¹³ *People v. Rainbow Light Nutritional Systems, LLC*, Case No. 19STCV28214 (LA Sup. Ct. Aug. 14, 2019).

decision were to stand, future defendants can avoid the well-settled distinction between commercial and noncommercial speech, and argue, as Sony has, that it was a somehow unknowable whether a product was truly “free” of heavy metals, and thus any statement was one of opinion—and thus protected noncommercial speech. Such a defendant could even argue that there is more “art” than “science” in the formulation of a food supplement “recipe”—vitamins are supplements, not drugs. This sort of defense could fall squarely within *Serova*’s protective parameters.

A final case example arises primarily under federal consumer protection laws. The Los Angeles City Attorney, on behalf of the People, is a co-plaintiff in the case of *Bureau of Consumer Financial Protection et al. v. Consumer Advocacy Center Inc. et al.*¹⁴ This matter involves a student loan debt relief scheme. The district court has entered judgments against some defendants, under numerous federal and state consumer protection laws, including California’s Unfair Competition Law.¹⁵ Finding that the People had properly alleged a claim for relief on default, including for false and deceptive statements to student borrowers regarding their loans, the federal district court imposed a permanent injunction and awarded

¹⁴ *Bureau of Consumer Financial Protection et al. v. Consumer Advocacy Center Inc. et al.*, Case No. SACV 19-1998-MWF (KSx) (C.D.Cal., filed October 21, 2019) (“CAC”).

¹⁵ See Docket. No. 2 in *CAC* (Complaint) and Docket No. 134 (First Amended Complaint).

consumer restitution of over \$55 million and civil penalties of over \$33 million.¹⁶

As seen in many cases recently litigated by the Los Angeles City Attorney to protect the public from false coronavirus cures or tests or disinfectants, along with other frauds and scams, the Unfair Competition Law and False Advertising Law are critical prosecutorial tools to combat false commercial speech in the form of advertising or false statements associated with business acts or practices. (*See* Cal. Bus. & Prof. Code, §§ 17200, 17500, 17508.) It may at first appear a parade of horrors to see in the potential consequences of the *Serova* opinion a circumscribed ability for law enforcement to protect consumers and public health from the dangers of the marketing and sale of foods and drugs and disinfectants, but such further expansion of commercial speech doctrine may involve just such limitations on fundamental police powers.

There is no need to expand First Amendment commercial speech doctrine to allow false statements, in the guise of opinion, for claims that “purport to be based on factual, objective, or clinical evidence, . . . or purport to be based on any fact.” (Bus. & Prof. Code § 17508.) Reversing the Second Appellate District Court on this important commercial speech test and bringing this case in accord with federal, California, and other state

¹⁶ See Docket No. 243 in *CAC* (Order on Default Application against Certain Defendants) at pp. 6-14.

court precedence will ensure that public prosecutors, such as the Los Angeles City Attorney, have all the tools they need to enforce the Unfair Competition Law and protect the consumer's rights to true and accurate information in the marketplace.

Dated: February 12, 2021

Respectfully submitted,

By: /s/ Miguel J. Ruiz
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in California Rules of Court, rule 8.204(c)(1). The brief has been prepared in 13-point Times New Roman font. The word count is 4,324 words based on the word count of the program used to prepare the brief.

By: /s/Miguel J. Ruiz
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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **SEROVA v. SONY MUSIC
ENTERTAINMENT**

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Lower Court Case Number: **B280526**

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