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Supreme Court of California
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NO. S260736

IN THE

SUPREME COURT OF CALIFORNIA

VERA SEROVA,

Plaintiff/Cross-Defendant and Respondent,

v.

SONY MUSIC ENTERTAINMENT, et al.,

Defendants/Cross-Complainants and Appellants.

After a Decision by the Court of Appeal
Second Appellate District, Division Two
Case No.: B280526

On Appeal from the Los Angeles Superior Court
The Honorable Ann I. Jones
Sup. Ct. Case No.: BC548468

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE FIRST AMENDMENT COALITION IN SUPPORT OF DEFENDANTS-APPELLANTS

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke (SBN 141930)
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel: (415) 276-6500
Email: thomasburke@dwt.com

DAVIS WRIGHT TREMAINE LLP
Rochelle L. Wilcox (SBN 197790)
Dan Laidman (SBN 274482)
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017-2566
Tel: (213) 633-6800
Email: rochellewilcox@dwt.com
danlaidman@dwt.com

Attorneys for Amicus Curiae
First Amendment Coalition

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The First Amendment Coalition ("FAC") respectfully submits this Amicus Curiae Brief in Support of Defendants-Appellants Sony Music Entertainment, John Branca, as co-executor of the Estate of Michael J. Jackson, and MJJ Productions, Inc. ("Defendants").

This appeal raises important questions about the application of California Code of Civil Procedure § 425.16 (the "anti-SLAPP" statute), and the distinction between commercial and non-commercial speech. FAC respectfully encourages this Court to affirm the Court of Appeal's holding, and to decline the invitation by Plaintiff and her Amici to create new limitations on the scope of the anti-SLAPP statute and on protections for the promotion of constitutionally-protected expressive works.

APPLICATION TO SUBMIT AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), FAC respectfully requests this Court's permission to submit the attached Amicus Curiae Brief. FAC is a non-profit, public interest organization committed to freedom of speech, more open and accountable government, and public participation in civic affairs. Founded in 1988, FAC's activities include legislative oversight of bills in California affecting access to government and free speech, free legal consultations on First Amendment issues,

educational programs, and public advocacy, including extensive litigation and appellate work. FAC's members are news organizations, law firms, libraries, civic organizations, academics, freelance journalists, bloggers, community activists, and ordinary citizens.

FAC has decades of experience litigating the scope and proper interpretation of the anti-SLAPP statute. Journalists, activists, artists, and entertainers throughout the state rely on the law to deter and defeat meritless claims arising from speech, which otherwise can impose daunting litigation costs regardless of a case's outcome. FAC has a strong interest in ensuring that the anti-SLAPP statute remains a robust tool that can serve this purpose, and it can offer this Court valuable perspective on the statute.

This appeal also could affect how courts delineate commercial and non-commercial speech in a variety of different contexts, beyond the immediate facts of this case. FAC's experience with First Amendment litigation, and its familiarity with the concerns of its members who publish and promote expressive works on matters of public interest, makes it well-positioned to address these broader implications. Therefore FAC respectfully requests that the Court grant its Application and consider this Amicus Brief.[1]

[1] Pursuant to California Rule of Court 8.520(f)(4), FAC advises the Court that no party or counsel for a 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. No person or

AMICUS CURIAE BRIEF

I. SUMMARY OF ARGUMENT

Plaintiff and her Amici aim their rhetoric at powerful corporations, but they ask this Court to curtail free speech protections in ways that would affect all artists, entertainers, and journalists in this state, large and small. This appeal presents the Court with an opportunity to reinforce well-established anti-SLAPP and commercial speech principles in a clear and helpful manner, without acceding to the requests of Plaintiff and her Amici to narrow speech protections in a way that will do harm to the kind of expressive speech the anti-SLAPP statute was adopted to protect. The Court of Appeal reached the correct outcome, guided by familiar First Amendment principles, and its decision does not pose any danger to the enforcement of consumer protection laws.

As an initial matter, the Court of Appeal properly applied the anti-SLAPP statute, which must be construed broadly to protect speech. See Section II. The request by Plaintiff's Amici for the Court to "narrow the breadth" of the law contravenes the broad construction mandate and consistent rulings by this Court, and is based on a series of fundamental misconceptions about how Section 425.16 works. Id. The anti-SLAPP

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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.

statute necessarily applies to any cause of action that arises from public interest speech, no matter how it is labeled. Moreover, the Legislature already has considered the same warnings about "corporate abuse" of the anti-SLAPP statute, and responded with an amendment that expressly preserved the ability of media defendants to move to strike claims arising from advertisements for expressive works. Id.

With respect to the merits, this Court and the U.S. Supreme Court have emphasized that whether speech is commercial or non-commercial depends on the particular content and context of the speech, and that different commercial settings warrant different approaches. See Section III. Nonetheless, Plaintiff and her Amici advocate a rigid rule that would deem all allegedly false or misleading promotional statements commercial, regardless of the context. But content-based claims like the one in this case that target statements in advertisements about the content of expressive works of art, entertainment, or journalism raise unique First Amendment concerns, and they are subject to the same First Amendment demands and limitations as claims based on the underlying expressive content. Id.

For the reasons discussed below, FAC respectfully urges this Court to affirm the Court of Appeal's decision, and decline the request to limit the scope of the anti-SLAPP statute. The Court also can provide guidance that balances free speech and consumer protection interests by clarifying that, when deciding content-based claims, advertising speech is non-commercial

where, as here, the challenged statement directly reflects the content of the expressive work being promoted.

II. THE COURT OF APPEAL PROPERLY APPLIED THE FIRST PRONG OF THE ANTI-SLAPP STATUTE

The Legislature amended the anti-SLAPP statute in 1997 to expressly provide that the law "shall be construed broadly." C.C.P. § 425.16(a). This Court repeatedly has recognized the "Legislature's directive that the anti-SLAPP statute is to be 'construed broadly' so as to 'encourage continued participation in matters of public significance.'" E.g., City of Montebello v. Vasquez, 1 Cal. 5th 409, 421 (2016). Conversely, this Court has "repeatedly emphasized that the exemptions" to the anti-SLAPP statute "are to be narrowly construed." Id. at 419-20 (quotations omitted). See also Barry v. State Bar, 2 Cal. 5th 318, 321 (2017) ("[t]he statute instructs that its provisions are to be 'construed broadly'").

Nevertheless, Plaintiff's Amici expressly ask the Court to "narrow the breadth of the anti-SLAPP statute." Consumer Attorneys Of California Amicus Brief ("CAOC Br.") at 6, 29. This would contravene the Legislature's clear mandate that the statute be broadly construed. Amici's criticisms are based on a number of misconceptions about Section 425.16, and they do not provide any grounds for limiting the law's scope.

A. Media Companies Are Among The Primary Speakers The Anti-SLAPP Statute Is Intended To Protect.

Amici use David vs. Goliath rhetoric to suggest that the anti-SLAPP statute was only intended to protect individuals and nonprofits, and that there is something inherently abusive about the use of the anti-SLAPP statute in cases like this one, which they contend thus requires new limits on the use of the law by corporations. E.g., CAOC Br. at 5-6, 25; CCLEJ Br. at 2, 26-27. But a defendant's size and financial resources are irrelevant to whether they may use the anti-SLAPP statute. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1199 (9th Cir. 2003) ("California and federal courts have repeatedly permitted defendants to move to strike under the anti-SLAPP statute despite the fact that they were neither small nor championing individual interests"). The anti-SLAPP statute was intended to apply to all those who create and distribute works of art, entertainment, and news, regardless of whether they are individuals, nonprofits, or businesses. See Ingels v. Westwood One Broadcasting Servs., 129 Cal. App. 4th 1050, 1067-68 (2005).

Amici turn back the clock by re-arguing the same position as early – and discredited – anti-SLAPP decisions like Zhao v. Wong, 48 Cal. App. 4th 1114 (1996), which denied protection in a media-related case and held that the law was limited to "paradigmatic" anti-SLAPP suits involving citizen petitioning activity. Id. at 1124. Other contemporary cases

disagreed, explaining that "news reporting activity is free speech," and the SLAPP statute can apply to media defendants. Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 1046 (1997). The Legislature settled the matter in 1997 by amending the anti-SLAPP statute to embrace the Braun line of cases and their expansive view of the law's reach, adding the express requirement that the statute "shall be construed broadly." C.C.P. § 425.16(a).

This Court has explained that the purpose of the 1997 amendment was to overrule Zhao and other early cases – which Plaintiff's Amici nevertheless now echo – that "were mistaken in their narrow view of the relevant legislative intent." Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1120 (1999). Six years later, the Legislature amended the anti-SLAPP statute again and this time left no doubt that the law was available to media companies, including in cases based on advertising for expressive works. C.C.P. § 425.17(d)(2).

Amici present out-of-context excerpts from the legislative history for Section 425.17 to rail generally against "corporate abuse," but in fact the 2003 Amendment shows that this is precisely the type of case that the Legislature meant to keep within the scope of Section 425.16. E.g., CCLEJ Br. 26-28; CAOC Br. 27. The Legislature fully considered the issue of corporations using the anti-SLAPP statute in commercial contexts, and responded with a carefully crafted revision that "exempts only a subset of

commercial speech – specifically, comparative advertising." FilmOn.com Inc. v. DoubleVerify Inc., 7 Cal. 5th 133, 147 (2019) (quotation omitted; emphasis added).

The Legislature specifically preserved the availability of the anti-SLAPP statute for claims "based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work…." C.C.P. § 425.17(d)(2) (emphasis added). "For claims arising from these activities, the current SLAPP motion would remain available to these defendants." Ingels, 129 Cal. App. 4th at 1067-68 (examining history of 2003 amendment and Section 425.17(d)(2)).

When corporations do in fact bring meritless anti-SLAPP motions, courts have ample means to deal with them under existing law. E.g., Park v. Board of Trustees, 2 Cal. 5th 1057, 1060 (2017) (anti-SLAPP motion should be denied if claim does not actually arise from protected activity); FilmOn.com, 7 Cal. 5th at 153 (same where company is sued over speech about private business issue that "never entered the public sphere"); Central Valley Hospitalists v. Dignity Health, 19 Cal. App. 5th 203, 222-23 (2018) (denying company's anti-SLAPP motion that failed to identify protected activity and discussing the availability of sanctions in similar cases).

But the Legislature had good reasons for not categorically limiting the scope of Section 425.16 to exclude "corporate" defendants. Plaintiff's

Amici make much of the fact that Sony is a "well-funded international corporation" (e.g., CAOC Br. 5), but they argue for sweeping categorical restrictions that necessarily would also apply to independent record labels and individual artists, who also rely on the anti-SLAPP statute to deter and defend against meritless claims arising from how they inform the public about the contents of their work through album covers and advertisements.

On the news side, independent journalists and nonprofit newsrooms would be just as vulnerable to threats and claims arising from magazine covers or social media posts promoting certain articles. And of course even many larger media companies now have fewer resources to defend against legal actions given the financial realities of the rapidly-changing media landscape. The "David v. Goliath" framing fails to take these realities into account, nor does it accurately portray cases like this one, where there is scant indication of actual or plausible consumer harm, and the plaintiffs' class action bar is a powerful entity in its own right. Plaintiffs and their Amici have not identified any problem with the scope of the anti-SLAPP statute that warrants narrowing the law.

B. Alleged Falsity Is Not Relevant At The Prong One Stage.

Another key misconception in the Briefs submitted by Plaintiff's Amici is the notion that the anti-SLAPP statute cannot or should not apply because the speech at issue is alleged to be false, and thus not constitutionally-protected. E.g., CCLEJ Br. at 6 (Constitution does not

protect "false or actually misleading commercial speech. The anti-SLAPP statute therefore has no bearing here…") (citation omitted); id. at 24 ("[s]ince Sony has no constitutional right to engage in deceptive advertising, Sony's misleading commercial statements to promote *Michael* are not 'protected speech' for purposes of the anti-SLAPP statute"); CAOC Br. at 18 (arguing that "defendants fail the first prong of the FilmOn test" because Defendants admitted for purposes of the anti-SLAPP Motion that the songs were not sung by Jackson).

Courts repeatedly have rejected this same notion that speech cannot constitute "protected conduct" under prong one if it is alleged to be false. This "conflates the threshold question of whether [the plaintiff's] claims are based on protected activity and the question whether [the plaintiff] has established a probability of prevailing on the merits." Collier v. Harris, 240 Cal. App. 4th 41, 53 (2015). Any "'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise and support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.'" Id. (quoting Navellier v. Sletten, 29 Cal. 4th 82, 94 (2002) (alteration in original)). See also DuPont Merck v. Superior Court, 78 Cal. App. 4th 562, 567 (2000) (plaintiff's

claim that Section 425.16 does not apply to "false, deceptive, and misleading statements" put the "cart before the horse").[2]

Moreover, this Court has explained that the "Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition," but also included "'any act ... in furtherance of' those rights." Vasquez, 1 Cal. 5th at 421 (quoting C.C.P. § 425.16(b)(1)). "The Legislature's directive that the anti-SLAPP statute is to be 'construed broadly' so as to 'encourage continued participation in matters of public significance' supports the view that statutory protection of acts 'in furtherance' of the constitutional rights incorporated by section 425.16 may extend beyond the contours of the constitutional rights themselves." Id. Consequently, "[t]o meet its threshold burden, a defendant need not establish that [its] action is constitutionally protected;

[2] Conduct "that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage … simply because it is alleged to have been unlawful or unethical." Kashian v. Harriman, 98 Cal. App. 4th 892, 910-11 (2002) (original emphasis). "If that were the test, the statute … would be meaningless." Id. See also Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 305 (2001) (rejecting the plaintiff's argument that lawsuit did not fall within the anti-SLAPP statute because defendant had no First Amendment right to engage in the allegedly unlawful conduct at issue; the argument "confuses the threshold question of whether the SLAPP statute applies with the question whether [plaintiff] has established a probability of success on the merits"); Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty, 129 Cal. App. 4th 1228, 1245-46 (2005) (same); Doe v. Gangland Productions, Inc., 730 F.3d 946, 954 (9th Cir. 2013) ("[t]o determine whether a defendant has met its initial burden [under the anti-SLAPP statute], a court does not evaluate whether defendant's conduct was lawful or unlawful. Instead, 'any "claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise and support"' in the second step of the analysis when the plaintiff bears the burden to show a probability of prevailing").

rather, [it] must make a prima facie showing that plaintiff's claim arises from an act taken to further defendant's rights of petition or free speech in connection with a public issue." Price v. Operating Engineers Local Union No. 3, 195 Cal. App. 4th 962, 970 (2011) (emphasis added).

For similar reasons, it is simply irrelevant that Defendants do not challenge Plaintiff's claim of falsity for purposes of their anti-SLAPP motion. Amici make far too much of this point, suggesting that it should be determinative under prong one. E.g., CCLEJ Br. at 7, 23; CAOC Br. at 18. But in Barry v. State Bar, 2 Cal. 5th 318 (2017), this Court explained that "failure of proof, or lack of substantive merit more generally, is not the only ground for striking a cause of action." Id. at 324. "Thus, while a ruling on an anti-SLAPP motion may involve a determination of the merits of the plaintiff's claim, it may in other cases involve a determination that the plaintiff's claim fails for another, nonmerits-based reason, such as lack of subject matter jurisdiction." Id.[3]

Consequently, it is not necessary for the defendant to raise any "substantive" merits defense at all, let alone one based on lack of falsity.

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[3] As this Court further explained, this "conclusion accords with the basic purpose underlying the anti-SLAPP statute: namely, to shield defendants from the undue burden of defending against claims filed not for the purpose of securing judicial redress, but to intimidate or harass on the basis of the defendant's constitutionally protected activity. A claim may fall into this category if it lacks substantive merit, but it may also fall into this category if it is filed in a tribunal that lacks the power to hear it." Id.

Id. And with content-based claims, there are many different dispositive defenses that do not hinge on whether the speech is true or false. E.g., John Doe 2 v. Superior Court, 1 Cal. App. 5th 1300, 1320-21 (2016) (anti-SLAPP motion can be resolved on grounds that speech at issue is opinion, or not reasonably susceptible to the alleged defamatory meaning, without resolving the truth of the statements); Paterno v. Superior Court, 163 Cal. App. 4th 1342, 1351 (2008) (same where defendant argued claim failed as a legal matter because statements were privileged). Indeed, this is the very nature of the absolute privilege afforded to some speech, which nonetheless remains well within the protection of the anti-SLAPP statute. E.g., Argentieri v. Zuckerberg, 8 Cal. App. 5th 768, 791 (2017) (granting anti-SLAPP motion based on fair report privilege, Civil Code § 47(d)).

For this reason, anti-SLAPP defendants routinely, and properly, forgo challenging a plaintiff's claim that the speech at issue is false for the limited purpose of the special motion to strike, and instead focus on other dispositive legal defenses. E.g., Balzaga v. Fox News Network, LLC, 173 Cal. App. 4th 1325, 1334 (2009) (defendant agreed to waive truth defense "for purposes of the anti-SLAPP motion," which could be decided on other grounds). Courts have made clear that such limited-purpose concessions do not prevent granting the motion on an independent basis. Id. at 1342 (finding that plaintiffs' attempted reliance on the defendant's waiver of the

truth defense was "without merit" and striking claims for lack of a reasonably susceptible defamatory meaning, regardless of alleged falsity).

That is precisely what the Court of Appeal did here by granting the anti-SLAPP motion based on a purely legal defense that applies regardless of alleged falsity, namely that the speech was non-commercial and thus outside the scope of the relevant statutes as a matter of law. See Serova v. Sony Music Entertainment, 44 Cal. App. 5th 103, 124, 132 (2020). Defendants' limited stipulation regarding falsity is no grounds for reversal, let alone imposing new restrictions on Section 425.16.

C. The Anti-SLAPP Statute Applies To Consumer Protection Claims.

Plaintiffs' Amici similarly call for limiting anti-SLAPP motions directed against "consumer protection claims." CCLEJ Br. at 2. Id. at 23 ("anti-SLAPP motions should play little if any role in actions brought under California's deceptive advertising laws"). But as this Court has made clear, absent express statutory exemptions, "[n]othing in the statute itself categorically excludes any particular type of action from its operation, and no court has the power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." Navellier v. Sletten, 29 Cal. 4th 82, 92 (2002) (quotation omitted). As shown by the amendments discussed above, the Legislature has revisited the anti-SLAPP statute

multiple times, including to address abuse of the law by some businesses, and it chose not to categorically exclude consumer protection claims.

This Court recently elaborated on this principle, and explained that application of the anti-SLAPP statute does not hinge on how a plaintiff labels a cause of action because any type of claim can implicate the purpose of Section 425.16. See Baral v. Schnitt, 1 Cal. 5th 376, 384 (2016) (courts cannot allow "artful pleading to evade the reach of the anti-SLAPP statute"). In Wilson v. CNN, 7 Cal. 5th 871 (2019), this Court rejected an analogous request to "effectively immunize claims of discrimination or retaliation from anti-SLAPP scrutiny." Id. at 889. The Court reasoned that such a limit would be inconsistent with the text of the law and legislative intent, adding, "[n]or can we infer that failure to include such an exception was a legislative oversight." Id. at 889. "After all, a meritless discrimination claim, like other meritless claims, is capable of chilling the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Id. (quotation and alterations omitted).

The Court found concerns about abuse of the law to be "overstated," noting that discrimination claims still need to meet the rigorous "arising from" requirement from Park in order to qualify for anti-SLAPP protection, and that claims still survive under prong two if the plaintiff shows a

probability of success. Id.[4] "We see no realistic possibility that anti-SLAPP motions will become a routine feature of the litigation of discrimination or retaliation claims." Id. at 890. The same is true here with respect to consumer protection claims. The vast majority of UCL and CLRA claims involve ordinary consumer products and business services, not constitutionally-protected expressive works. In the relatively few cases where defendants do bring anti-SLAPP motions, courts are perfectly able to weed out garden-variety UCL and CLRA claims that do not arise from public interest speech by applying the standards from Park and FilmOn.

But just as some discrimination claims are "capable of chilling the valid exercise of the constitutional right[] of freedom of speech," the same is true of some consumer protection claims. Wilson, 7 Cal. 5th at 889.[5]

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[4] Amici reveal their fundamental misunderstanding of the anti-SLAPP statute in calling it a "get-out-of-jail-free card" (CCLEJ Br. at 7) that renders defendants "immune from suit" (CAOC Br. 15). The "anti-SLAPP statute does not insulate defendants from any liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, meritless claims arising from protected activity." Baral, 1 Cal. 5th at 384 (original emphasis). And as the Amici Briefs from the Attorney General and Los Angeles City Attorney point out, the anti-SLAPP statute does not apply to public enforcement actions, which is the primary means of addressing the most serious consumer protection issues. C.C.P. § 425.16(d).

[5] Amici argue that the statute "has no bearing here because Plaintiff's lawsuit was not "brought in order to chill Sony's constitutional rights." CCLEJ Br. at 2. But this Court has made clear the law has no such "intent-to-chill limitation." Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 66 (2002). "Obviously, not only when a plaintiff intends to chill speech may the filing of a lawsuit have that result." Id. at 60 (original emphasis). Intended or not, the possible chilling effects of this case are apparent from Plaintiff's Opening Brief, which suggests that lawyers and judges should be writing the text of album covers, complete with proposed language. E.g., OB 53. Cf. Brodeur v. Atlas Entertainment, Inc., 248 Cal.

Indeed, this Court has recognized that the broad nature of the state's consumer protection laws might invite some plaintiffs to try to "plead around absolute barriers to relief by relabeling the nature of the action as one brought under the unfair competition statute." Cel-Tech Comms. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 182 (1999).

There are stark examples of this in the anti-SLAPP context. In Bernardo v. Planned Parenthood Federation of America, 115 Cal. App. 4th 322 (2004), the plaintiffs sued Planned Parenthood, claiming that statements on its website about the safety of abortion violated California's unfair competition law and false advertising laws. Id. at 327-28. The plaintiffs argued that the statements constituted "advertising within the meaning of the UCL and FAL" given Planned Parenthood's role as a provider of abortion services, not just an advocacy organization. Id. at 337. The trial court granted Planned Parenthood's anti-SLAPP motion and the appellate court affirmed, explaining that the plaintiffs had used the consumer protection laws to target speech "on issues of public concern that the First Amendment was designed to promote and protect." Id. at 360.

Other examples abound of cases in which the anti-SLAPP statute was properly invoked to strike unfair competition or false advertising

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App. 4th 665, 677 (2016) ("we decline to dissect the creative process"); Lyle v. Warner Bros. Tele. Prods., 38 Cal. 4th 264, 295-96 (2006) ("The First Amendment protects creativity." (citing Winter v. DC Comics, 30 Cal. 4th 881, 888, 891 (2003))) (Chin, J., concurring).

claims targeting expressive speech. E.g., Ingels, 129 Cal. App. 4th at 1055 (Section 17200 claim based on choice of participants in radio program); Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 674 (2010) (unfair business practices claims based on inclusion of musicians in magazine feature piece); New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1105 (C.D. Cal. 2004) (Section 17200 and false advertising claims arising from "disputed content of [a] software [program that] addresses a subject of public importance and debate"); Maloney v. T3Media, Inc., 853 F.3d 1004, 1009 (9th Cir. 2017) (unfair competition law claim based on "the publication and distribution of expressive photographs over the Internet"); Mireskandari v. Associated Newspaper Ltd et al., 2014 WL 12561581, at *1-3, 7 (C.D. Cal. Aug. 4, 2014) (Section 17200 claim based on newspaper's reporting and publications about plaintiff); see generally Thomas R. Burke, Anti-SLAPP Litigation, §§ 4:52, 5:87 (The Rutter Group 2020) (listing unfair business practice claims as addressed in the first and second prongs of the SLAPP analysis).

Similarly, courts regularly apply the anti-SLAPP statute and core First Amendment principles to strike right of publicity and related claims arising from the alleged use of a plaintiff's identity in advertising for an expressive work. E.g., De Havilland v. FX Networks, LLC, 21 Cal. App. 5th 845, 861-62 (2018) (claims directed at "social media promotion" for television docudrama); Hoang v. Tran, 60 Cal. App. 5th 513, 538-39 (2021)

(claims directed at alleged promotions for online publication about plaintiff that "concerned a matter of public interest"); Arenas v. Shed Media U.S. Inc., 881 F. Supp. 2d 1181, 1192 (C.D. Cal. 2011) (claims based on promotions for television docuseries).

In all of these cases, plaintiffs have attempted to evade the anti-SLAPP statute by characterizing their claims as ones that arise from advertising or commercial speech. But as this Court has made clear, "[s]ome commercially oriented speech will, in fact, merit anti-SLAPP protection." FilmOn.com Inc. v. DoubleVerify Inc., 7 Cal. 5th 133, 153 (2019). While the commercial nature of the speech merits some consideration it is not decisive, and the court still must do the necessary content-based and contextual analysis on a case-by-case basis. Id.

The Court of Appeal properly held that the claims in this case fit within the broad scope of Section 425.16. While the panel focused largely on the dispute over whether Jackson sang three of the songs on the album, the claims meet the public interest standard apart from this particular controversy. Serova, 44 Cal. App. 5th at 119-124. The anti-SLAPP statute's public interest requirement is not evaluated based on the specific statements at issue, but on the "'broad topic' of defendants' publications." Gangland Productions, 730 F.3d at 956 (quoting M.G. v. Time Warner, 89 Cal. App. 4th 623, 956 (2001)). Accord Taus v. Loftus, 40 Cal. 4th 683, 712 (2007) (anti-SLAPP statute applied to litigation arising from

defendants' publications and newsgathering activities because there was "no question … that defendants' general course of conduct from which plaintiff's cause of action arose was clearly activity 'in furtherance of [defendants'] exercise of … free speech … in connection with a public issue'") (emphasis added; citations omitted); Terry v. Davis Cmty. Church, 131 Cal. App. 4th 1534, 1547-48 (2007) (statute applied to statements about plaintiffs' relationship with minor because "the broad topic … was the protection of children in church youth programs").

Applying these principles within the framework recently enunciated in FilmOn, the first step is clear-cut, as the relevant issue of public interest is simply Michael Jackson's unquestionably very popular music. See Symmonds v. Mahoney, 31 Cal. App. 5th 1096, 1109 (2019) ("Mahoney's music and concerts were of interest to the public," noting that "he had sold millions of records and had hundreds of thousands of people following him on social media" and his "music and performances were of interest to the public"; therefore "Mahoney's selection of a drummer was conduct 'in connection with ... an issue of public interest'" under anti-SLAPP statute).

Applying the second, contextual FilmOn step, the statements at issue were made to the general public, including on the album itself, and directly reflected the artistic content of the work by identifying the artist and describing the songs. Serova, 44 Cal. App. 5th at 112. Not only does this have the requisite "connection" with the underlying artistic work, but courts

have recognized that there is an independent public interest in the identification of artists and other creators of works of popular entertainment. E.g., Kronemyer v. IMDB, 150 Cal. App. 4th 941, 949 (2007) (statute applied to claim about website's listing of credits for the film "My Big Fat Greek Wedding"); Tamkin v. CBS, 193 Cal. App. 4th 133, 144 (2011) (recognizing the distinct "public interest in the writing, casting and broadcasting of" an episode of a popular television show).

The public interest requirement is met here based on these well-established principles, without needing any additional consideration of the particular alleged dispute over the three songs. And despite the dire warnings about the decision's impact from Plaintiff's Amici, the Court of Appeal made clear that nothing about this case would bring a "mundane commercial misrepresentation" regarding an expressive work within the scope of the anti-SLAPP statute. Serova, 44 Cal. App. 5th at 116.

A newspaper ad that falsely promises 7-day-a-week home delivery, or a DVD label that erroneously claims that the disc works with all players or offers the highest-possible picture quality, likely would fail the threshold anti-SLAPP test even though the "product" is expressive. But where claims target promotional statements about the constitutionally-protected content of the work – a backdoor attack on the content itself – well-established anti-SLAPP and First Amendment principles require a different outcome, as the Court of Appeal properly held.

III. PROMOTIONAL STATEMENTS THAT DIRECTLY REFLECT THE CONTENT OF A CONSTITUTIONALLY-PROTECTED EXPRESSIVE WORK ARE NON-COMMERCIAL SPEECH

A. A Long Line Of Cases Has Applied The First Amendment To The Kind Of "Commercial" Content Challenged Here.

More than four decades ago, this Court's then-Chief Justice recognized that the First Amendment barred a plaintiff from bringing a right of publicity claim based on the use of his likeness in advertising for a movie about his life, explaining that "[i]t would be illogical to allow respondents to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise." Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 873 (1979) (Bird, C.J., concurring). "Since the use of [plaintiff's] name and likeness in the film was not an actionable infringement of [his] right of publicity, the use of his identity in advertisements for the film is similarly not actionable." Id.

Chief Justice Bird's concurrence has been an especially influential and oft-cited decision.[6] It has contributed to a well-developed and consistent body of misappropriation case law throughout the country holding that "[a]dvertising for constitutionally protected expressive media

[6] The Chief Justice's opinion "commanded the support of the majority of the court," because it was joined or endorsed by three other Justices. Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 396 n.7 (2001); accord Winter v. DC Comics, 30 Cal. 4th 881, 887-88 (2003) (treating opinion as controlling).

shares the constitutional immunity of the media use itself." 2 McCarthy, The Rights of Publicity and Privacy (2019 ed.) § 8:69, p. 223 (McCarthy).

Plaintiff acknowledges this line of authority but insists that this case is different because it involves consumer protection claims alleging false advertising. See Plaintiff's Reply Brief ("RB") at 37-39. But Plaintiff and her Amici call for a much broader expansion of the definition of commercial speech, that necessarily would sweep beyond the consumer protection context and create conflicts with this line of "adjunct" or "incidental use" law, while threatening to chill other vital protected speech.

Plaintiff argues that the description on an album cover of the constitutionally-protected music contained therein "in substance do[es] not differ from a false description of ingredients on the bottle of a dietary supplement." RB 28-29. And Plaintiffs' Amici go even farther in advocating an especially rigid approach that would give virtually no consideration to the relationship between the advertising statement at issue and an underlying expressive work. E.g., Attorney General Amicus Brief ("A.G. Br.") at 16-17, 29-32; CCLEJ Br. at 15-19; CAOC Br. at 4, 9.

The Attorney General argues that the key distinction is that claims based on alleged "false or misleading" commercial speech have no constitutional implications. A.G. Br. 29. He acknowledges, as he must, the line of First Amendment cases applying constitutional limits to defamation claims, because some erroneous statements are inevitable in robust public

debate and it would impermissibly chill important speech if a falsehood itself was sufficient for liability. Id. See also Blatty v. New York Times Co., 42 Cal. 3d 1033, 1045 (1986) (holding that these same constitutional protections apply not just to defamation actions but to any cause of action "whenever the gravamen of the claim is injurious falsehood").[7] But he states flatly that "those limitations do not apply 'in the commercial arena.'" A.G. Br. 30 (quoting Bates v. State Bar, 433 U.S. 350, 383 (1977)).

In Bates, the U.S. Supreme Court made clear that the "constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services." 433 U.S. at 384 (emphasis added). In the sentence that the Attorney General quotes, the Court explained that in that specific context – i.e., legal advertising – the cases giving breathing room for some falsehoods have "little force in the commercial arena." Id. at 383. In the very next line, the Court observed that "because the public lacks sophistication concerning legal services, misstatements that might be

[7] Just like this case, Blatty involved unfair competition and false advertising claims under Business and Professions Code §§ 17200 and 17500. 42 Cal. 3d at 1038. And the claims in that case also involved the purported misidentification of an artistic work. Specifically, the plaintiff, author William Peter Blatty, sued the New York Times for not including one of his books in its "best sellers" list. Id. at 1036. This Court rejected Blatty's argument that the list was commercial speech; "[t]hat the Times is alleged to have marketed the list for its newspaper profit does not affect the result: commercial motivation does not transform noncommercial speech into commercial speech." Id. at 1048 n.3.

overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Id. Therefore, the "determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience," and "[t]hus different degrees of regulation may be appropriate in different areas." Id. at 383 n.37 (emphasis added).

Therefore if Bates stands for any proposition, it is that different types of advertising warrant different levels of constitutional scrutiny, and "[i]f commercial speech is to be distinguished, it must be distinguished by its content." Id. at 363 (quotation omitted). Statements in advertising for a book, movie, record, or newspaper that describe the expressive content of the work raise different constitutional concerns and different consumer protection rationales than allegedly false claims in advertising for legal services or dietary supplements.

One of the key distinctions is the level of fault. As Plaintiff and her Amici emphasize, the UCL is a strict liability statute, and a defendant can be held liable based solely on a finding of falsity or likely deception. E.g., OB at 41-43; CCLEJ at 11; CAOC at 5. But for non-commercial speech, plaintiffs alleging injurious falsehood (no matter how the claim is labeled) must demonstrate some level of fault. See Blatty, 42 Cal. 3d at 1042. If the plaintiff is a public figure, that means meeting the stringent constitutional actual malice standard, i.e., "he must demonstrate with clear and convincing evidence that the defendant realized that his statement was false

or that he subjectively entertained serious doubt as to the truth of his statement." Id. (quotation omitted). When the plaintiff is a private figure but the publication relates to a matter of public concern, the plaintiff must demonstrate at a minimum that the defendant acted negligently. Id. And when speech deals with a matter of public concern, no plaintiff can recover presumed or punitive damages without demonstrating that the defendant acted with constitutional actual malice. See Carney v. Santa Cruz Women Against Rape, 221 Cal. App. 3d 1009, 1019-21 (1990).

This leads to an obvious potential double-standard, which could be easily exploited to evade constitutional protections. A "newspaper has a constitutional right to promote itself by reproducing its originally protected articles or photographs." Montana v. San Jose Mercury News, 34 Cal. App. 4th 790, 797 (1995). But if any and all allegedly false or misleading advertising statements are deemed commercial, then essentially the same statement would be subject to different levels of fault depending on whether it appears in the "originally protected article[] or photograph[]" or in a promotional format. A plaintiff might have to prove actual malice to win a claim based on a statement in a magazine article, but could potentially bring a strict liability UCL claim based on the same statement on the issue's cover.

The social media age provides new avenues for disgruntled subjects of critical news coverage or artistic portrayals to exploit this loophole and

plead around constitutional limitations. Journalists, publishers, and the creators and distributors of artistic works now routinely promote their articles, songs, shows, films, books, and podcasts on Twitter, Facebook, Instagram, and other social media sites, as well as their own websites, in multi-faceted and ever-changing ways.

Plaintiffs routinely include statements and depictions from such promotions in their content-based claims, where they are analyzed under the same constitutional principles applicable to the body of the work. E.g., Croce v. New York Times Co., 345 F. Supp. 3d 961, 970 (S.D. Ohio 2018) (cancer researcher sued the New York Times over statements questioning "the veracity of [his] research and … the financial motives of Ohio State in overlooking concerns about his work" that were published both in a newspaper article and in "posts by the Times on Twitter and Facebook promoting the Article"); De Havilland, 21 Cal. App. 5th at 862, 864 n.11 (actress brought right of publicity and false light claims based on her depiction in television docudrama and "social media promotion for the miniseries"). Under the theory advanced here by Plaintiff and her Amici, these plaintiffs would be able to avoid constitutional scrutiny entirely simply by limiting their claims to the related promotional content.

B. Amici's Attempt To Carve Out First Amendment Protection For The Source Of A Work Would Deny Constitutional Protection To A Wide Variety Of Expressive Speech.

To the extent that Plaintiff and her Amici suggest that the specific statements at issue are distinguishable because they merely convey the "source of the work," that also fails to take into account the relevant artistic interests. OB at 9. Their bright-line rule would reach far beyond the speech here, and seemingly deny constitutional protection to any statements on an album cover or in an advertisement that identify the artist, deeming that to be a mere representation of product origin. E.g., id. at 54.

But as the facts of this case demonstrate, authorship, attribution, and the identification of artistic works can be complex and nuanced, and often incompatible with the rigid, strict liability standards of the UCL and CLRA. Plaintiff and her Amici suggest this is a case about "forgery" (e.g., OB at 39, CAOC Br. at 7), but even in the explicit art forgery context it is widely recognized that there are "challenges in making steadfast determinations about artwork" and "it is sometimes difficult to conclusively authenticate works." Leila A. Amineddoleh, "Are You Faux Real? An Examination of Art Forgery and the Legal Tools Protecting Art Collectors," 34 Cardozo Arts & Ent. L.J. 59, 79-80 (2016) (discussing cases and concluding that "Sometimes There is No Definitive Answer Regarding Authorship").

Amici acknowledge as much, recognizing that "Sony's statements could be construed as partially true because *some* of the songs on the album were sung by Michael Jackson," but they nonetheless assert the advertising could be "misleading." CCLEJ Br. at 9 (original emphasis). Setting the bar so low, and allowing publishers and distributors to be held strictly liable for "partially true" statements describing artistic works because some could find it misleading, creates a clear conflict with the constitutional standards applicable to claims arising from statements in the body of an expressive work. E.g., Campanelli v. Regents, 44 Cal. App. 4th 572, 582 (1996) (no liability may be imposed for alleged injurious falsehoods that are "substantially true so as to justify the 'gist or sting' of the remark").

Moreover, sometimes a "false" or "misleading" attribution of authorship serves a legitimate creative purpose. In the landmark U.S. Supreme Court case Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), Hustler Magazine published a parody advertisement titled "Jerry Falwell talks about his first time," in which the famed televangelist and conservative activist purported to give an interview describing lurid sexual acts. Id. at 48. The Supreme Court held the parody ad was constitutionally protected speech on matters of public concern, barring Falwell's emotional distress claim. Id. at 57. Accord San Francisco Bay Guardian, Inc. v. Superior Court, 17 Cal. App. 4th 655, 657, 662 (1993) (First Amendment protected newsweekly's publication of parody letter-to-the-editor

purporting to be written by plaintiff); Pring v. Penthouse Intern., Ltd., 695 F.2d 438, 439 (10th Cir. 1982) (same; article purported to be written by Miss Wyoming); Mink v. Knox, 613 F.3d 995, 998 (10th Cir. 2020) (same; case arose from parodic "editorial column" in an "internet-based journal" purporting to be written by a university professor).

There also is a proud tradition of performers who use pseudonymous personas to make social, political, or artistic statements. In the 1970s, comedian Andy Kaufman and his associates performed under the identity of Tony Clifton. More recently, Sacha Baron Cohen has risen to fame conducting interviews and engaging in political and social satire using different identities like Borat, Bruno, and Ali G. The suggestion in this case that consumers were actually defrauded into buying a Michael Jackson album because part of a sentence, in miniscule type, buried at the bottom of the back of the album cover, failed to convey alleged uncertainty over who sang on three out of nine songs (e.g., OB at 13), is no more plausible than a lawsuit claiming consumers were defrauded into buying a Borat DVD because it was unclear from the cover that Borat is not a real journalist.

Blurring the lines of artistic identification is not limited to comedy or parodic contexts. Many famous and influential authors have used pen names, even publishing and promoting well-known books under different

identities.[8] Agatha Christie published novels under the name "Mary Westmacott," Isaac Asimov as "Paul French," and Stephen King as "Richard Bachman," among many other examples.[9] Alter egos also are common in the music world. Tupac Shakur released an album under the pseudonym Makaveli, and John Lennon was credited on some albums that he produced as Dr. Winston O'Boogie.[10] The broad theory of strict liability for false or misleading statements of authorship advanced by Plaintiff and her Amici would encompass promotions for all of these works.

As with the application of the anti-SLAPP statute discussed above, existing precedent already provides ample means for accommodating consumer protection and free speech interests, and this Court need not craft novel rules to decide this appeal. As set forth in detail in Defendants' briefing, the particular content at issue here – the description of music on an album cover and promotional material for that expressive work – is properly treated as noncommercial speech because it does more than propose a commercial transaction, it did not amount to objective

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[8] See https://en.wikipedia.org/wiki/List_of_pen_names; Audible, "Guide to Pseudonyms & Pen Names" ("For centuries, writers have been using alternate names, also known as pen names, noms de plume, or pseudonyms"), available at https://www.audible.com/blog/playlisted/article-what-is-a-pseudonym-guide.

[9] See https://www.treehugger.com/famous-authors-who-used-secret-pseudonyms-4864216.

[10] See https://www.nme.com/photos/25-musical-alter-egos-1436508.

information that Defendants could readily verify, and regulation via the UCL and CLRA of these statements is not consistent with traditional government authority to regulate commercial transactions. See Defendants' Answering Brief ("AB") at 35-56.

C. The Interpretation Defendants Advocate Fits Comfortably Within Existing Commercial Speech Jurisprudence.

The advertising statements at issue also could be viewed as being "inextricably intertwined" with the content of the non-commercial work being promoted. AB at 56-60; Dex Media West, Inc. v. City of Seattle, 696 F.3d 952, 958 (9th Cir. 2012) ("even if the publication meets this threshold commercial speech classification, courts must determine whether the speech still receives full First Amendment protection, because the commercial aspects of the speech are 'inextricably intertwined' with otherwise fully protected speech, such that the publication sheds its commercial character and becomes fully protected speech") (citing Riley v. Nat'l Fed. of the Blind of North Carolina, Inc., 487 U.S. 781, 796 (1988)).

In White v. City of Sparks, 500 F.3d 953 (9th Cir. 2007), the Ninth Circuit considered "the question of what protection the First Amendment extends to the sale by an artist of his paintings," and answered by holding "that an artist's sale of his original artwork constitutes speech protected under the First Amendment." Id. at 954. The court considered the "inextricably intertwined" line of authority, but noted that it mainly had

been applied in cases involving merchandise that "lacked inherent expressive value and gained expressive value only from its sale being 'inextricably intertwined' with pure speech." Id. at 955. By contrast, it explained that "visual art is inherently expressive." Id.

Consistent with all of these authorities, this Court can clarify that advertising statements that directly reflect the content of the inherently-expressive work being promoted are non-commercial speech for purposes of content-based legal claims. This would avoid expanding the commercial speech doctrine in a manner that limits vital protections for the underlying artistic and journalistic works, while also accommodating the countervailing interests.

This standard only would apply to claims that arise from the content of speech, and thus would not affect any content-neutral regulations. E.g., Charles v. City of Los Angeles, 697 F.3d 1146, 1153 (9th Cir. 2012) (upholding law regulating billboards, including ones that advertise television shows, and distinguishing content-based claims by explaining that, "[f]aced with the need to ensure that First Amendment-protected expression is not unduly chilled by the threat of tort actions that would otherwise prevent the truthful promotion of protected expressive works,

under certain circumstances we extend an advertised work's First Amendment protection to advertisements for the work").[11]

Nor would this standard limit any consumer protection claims based on the promotion or advertising of any product or service that is not itself "inherently expressive" under the First Amendment. White, 500 F.3d at 954. Cf. Los Angeles City Attorney Amicus Brief at 15 (expressing concerns about regulation of "unauthorized or fake at-home COVID-19 test kits, fake COVID-19 disinfectants, miracle COVID-19 cures and prosecuting numerous pandemic price-gouging cases regarding personal protective equipment, such as surgical masks and hand sanitizers").

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[11] Plaintiff and her Amici rely on Keimer v. Buena Vista Books, 75 Cal. App. 4th 1220 (1999), which allowed a UCL claim to proceed based on statements on the covers of investment advice books and videos touting allegedly false rates of return. Id. at 1223-24. The case is distinguishable because, like the legal services promoted in Bates, investment advising is a highly-regulated field in which advertising poses a unique danger of misleading vulnerable members of the public. See Bates, 433 U.S. at 383-84; Section III.A, supra. But Keimer also has drawn extensive criticism for failing to apply sufficient First Amendment scrutiny to the statements at issue given their connection to the content of the underlying books and videos. E.g., Charles, 697 F.3d at 1154-55 (noting cases that have parted ways with Keimer and held that, "[t]o protect the ability of speakers to promote their work, the 'incidental use' exception to general commercial speech principles has also been extended to actions for false advertising"); Lacoff v. Buena Vista Publ'g, Inc., 705 N.Y.S.2d 183, 191 (N.Y. Sup. Ct. 2000) ("[t]his court differs with the Keimer court's approach in that I recognize as paramount that the speech is not referring to a product such as condoms, as in Bolger, the case heavily relied upon in Keimer, but rather it refers to a book, the contents of which are themselves protected by the First Amendment"); William O'Neil & Co. Inc. v. Validea.com Inc., 202 F. Supp. 2d 1113, 1121-22 (C.D. Cal. 2002) (recognizing that Keimer created a problematic double-standard between the scienter requirement for claims based on the same statements on the cover and the inside of a book).

This carefully-calibrated standard would not insulate all advertising for entertainment products from consumer protection claims. It only would include statements directly reflecting underlying expressive content, and therefore would not preclude claims based on other statements about the product itself. Unlike statements that identify artists and describe their work, representations about the physical product do not raise the same constitutional implications. A false representation that an album is of a certain length or sound quality, or that a magazine or podcast subscription will be delivered in a certain manner, may well be deemed commercial in nature. See also Section II, supra.

Nor would this standard provide a "get-out-of-jail-free card to forgers." CAOC Br. at 7; AB at 39. There are many different legal tools available to hold fraudsters accountable for selling forged art besides strict liability content claims based on advertising for expressive speech. E.g., Amineddoleh, 34 Cardozo Arts & Ent. L.J. at 100-110 (discussing various legal remedies for art forgery, including fraud and contract claims, statutes regulating art dealers, criminal penalties, and FTC actions).

And where advertising conveys the false endorsement of an expressive work, the fact that the statement is deemed non-commercial does not preclude liability. Rather, a plaintiff can still hold the advertiser liable by making the necessary showing of fault. E.g., Cher v. Forum Int'l, 692 F.2d 634, 639-40 (9th Cir. 1982) (holding magazine publisher liable for

advertisements that "falsely stated that Cher had actually endorsed that magazine" where the evidence established that "the advertising staff engaged in the kind of knowing falsity that strips away the protection of the First Amendment"); Solano v. Playgirl, Inc., 292 F.3d 1078, 1080, 1085, 1089 (9th Cir. 2002) (plaintiff who met actual malice standard could hold magazine liable for defamation and right of publicity violation for falsely suggesting on its cover that he posed nude for the magazine).

By clarifying the application of the commercial speech doctrine to advertising for expressive works in this careful manner, this Court can resolve the current appeal and provide clear guidance to other courts and litigants in a way that protects both consumers and free speech.

IV. CONCLUSION

For all of these reasons, FAC respectfully encourages this Court to affirm the holding of the Court of Appeal.

Dated: March 10, 2021

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
Rochelle L. Wilcox
Dan Laidman

By: */s/ Thomas R. Burke*
Thomas R. Burke

Attorneys for Amicus Curiae
First Amendment Coalition

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520, the undersigned certifies that the text of this Application to Submit Amicus Curiae Brief and Proposed Amicus Curiae Brief, including footnotes, consists of 8,666 words in 13-point Times New Roman type as counted by the Microsoft Word 2010 word-processing program used to generate the text.

Dated: March 10, 2021

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
Rochelle L. Wilcox
Dan Laidman

By: *_/s/ Dan Laidman_*
Dan Laidman

Attorneys for Amicus Curiae
First Amendment Coalition

PROOF OF SERVICE

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Davis Wright Tremaine LLP, 865 South Figueroa Street, Suite 2400, Los Angeles, CA 90017.

On March 10, 2021, I hereby certify that I electronically filed the foregoing **APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE FIRST AMENDMENT COALITION IN SUPPORT OF DEFENDANTS-APPELLANTS** the Court's electronic filing system, TrueFiling (Tf.3).

I certify that participants in the case who are registered TrueFiling users will be served via the electronic filing system pursuant to California Rules of Court, Rule 8.70.

I further certify that case participants were served via United States Postal Service. I directed office personnel to place such envelope(s) with postage thereon fully prepaid for deposit in the United States Mail in accordance with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service.

****SEE ATTACHED SERVICE LIST****

Executed on March 10, 2021 at Riverside, California.

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

Ellen Duncan	*/s/ Ellen Duncan*
Print Name	Signature

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

SERVICE LIST

Court of Appeal Second Appellate Dist., Div. Two 300 South Spring Street Second Floor, North Tower Los Angeles, CA 90013 Hon. Ann I. Jones. Judge Los Angeles Superior Court 111 North Hill Street Los Angeles, CA 90012	Ari E. Moss, Esq.w Jeremy F. Bollinger, Esq. Dennis F. Moss, Esq. MOSS BOLLINGER, LLP 15300 Ventura Blvd., Suite 207 Sherman Oaks, CA 91403 ***Attorneys for Plaintiff/Respondent Vera Serova***
Zia F. Modabber, Esq. Andrew John Demko, Esq. Leah E. Solomon, Esq. Tami Kameda Sims, Esq. Charlotte Sophia Wasserstein, Esq. KATTEN MUCHIN ROSENMAN 2029 Century Park East, Suite 2600 Los Angeles, CA 90071 ***Attorneys for Defendants/Appellants John Branca, Sony Music Entertainment, MJJ Productions, Inc.***	Howard L. Weitzman, Esq. Suann C. MacIsaac, Esq. KINSELLA WEITZMAN ISER KUMP & ALDISERT LLP 808 Wilshire Blvd., 3rd Floor Santa Monica, CA 90401 ***Attorneys for Defendants/Appellants John Branca, Sony Music Entertainment, MJJ Productions, Inc.***
David M. Arbogast, Esq. ARBOGAST LAW 7777 Fay Avenue, Suite 202 La Jolla, CA 92037-4324 Micha Star Liberty, Esq. CONSUMER ATTORNEYS OF CALIFORNIA 701 L Street, Suite 1200 Sacramento, CA 95814 ***Attorneys for Amicus Curiae Consumer Attorneys of California***	Samuel Thomas Harbourt, Esq. OFFICE OF THE ATTORNEY GENERAL 455 Golden Gate Ave. Suite 11000 San Francisco, CA 94102-1497 ***Attorneys for Amicus Curiae Xavier Becerra***

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Eliza J. Duggan, Esq. UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW 225 Bancroft Way Berkeley, CA 94720-7200 ***Attorneys for Amicus Curiae UC Berkeley Center for Consumer Law & Economic Justice, Truth In Advertising, Inc., Public Counsel, Legal Aid Society of San Diego, Housing & Economic Rights Advocates, East Bay Community Law Center, Consumers for Auto Reliability & Safety, Consumer Action, Bay Area Legal Aid,***	Miguel Jesus Ruiz, Esq. William R. Pletcher, Esq. OFFICE OF THE LOS ANGELES CITY ATTORNEY 200 North Main Street 500 City Hall East Los Angeles, CA 90012 ***Attorneys for Amicus Curiae Michael N. Feuer***