Case No. S244157

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

FILMON.COM, INC.,

Plaintiff and Petitioner,

v.

DOUBLEVERIFY, INC.,

Defendant and Respondent.

After Decision by the Court of Appeal,
Second Appellate District, Division Three
Case No. B264047

AMICI CURIAE BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE HEARST CORPORATION, TEGNA INC., CALIFORNIA NEWS PUBLISHERS ASSOCIATION AND FIRST AMENDMENT COALITION IN SUPPORT OF DEFENDANT AND RESPONDENT DOUBLEVERIFY, INC.

KELLI L. SAGER
(State Bar No. 120162)
*ROCHELLE L. WILCOX
(State Bar No. 197790)
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017-2566
Tel.: (213) 633-6800
Fax: (213) 633-6899

THOMAS R. BURKE
(State Bar No. 141930)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel.: (415) 276-6500
Fax: (415) 276-6599

Attorneys for Amici Curiae

Case No. S244157

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

FILMON.COM, INC.,

Plaintiff and Petitioner,

v.

DOUBLEVERIFY, INC.,

Defendant and Respondent.

After Decision by the Court of Appeal,
Second Appellate District, Division Three
Case No. B264047

AMICI CURIAE BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE HEARST CORPORATION, TEGNA INC., CALIFORNIA NEWS PUBLISHERS ASSOCIATION AND FIRST AMENDMENT COALITION IN SUPPORT OF DEFENDANT AND RESPONDENT DOUBLEVERIFY, INC.

KELLI L. SAGER
(State Bar No. 120162)
*ROCHELLE L. WILCOX
(State Bar No. 197790)
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017-2566
Tel.: (213) 633-6800
Fax: (213) 633-6899

THOMAS R. BURKE
(State Bar No. 141930)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel.: (415) 276-6500
Fax: (415) 276-6599

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

TO THE HONORABLE CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amici Curiae MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE HEARST CORPORATION, TEGNA INC., CALIFORNIA NEWS PUBLISHERS ASSOCIATION and FIRST AMENDMENT COALITION (collectively "Amici") respectfully submit this Amici Curiae Brief in support of Defendant-Respondent DoubleVerify, Inc. ("DoubleVerify").

As described in their Application, Amici and their members are actively engaged in the creation and dissemination of information to the public through news reports, motion pictures, biographies, and documentaries, as well as docudramas, historical fiction, and other creative works. They have a strong interest in protecting their work and combating the piracy that is an unfortunate part of today's media environment – including piracy occurring via the ubiquitous websites that traffic in pirated works. As part of their fight against piracy, Amici support efforts to ensure that sites and services engaged in rampant copyright infringement do not participate in the legitimate online advertising market. Companies like DoubleVerify, which conducts thorough research and provides legitimate brands and other participants in the online advertising ecosystem with

information they need to prevent their advertisements from being associated with and appearing on websites that have built their business model on the theft of intellectual property, are an important part of these efforts. This lawsuit threatens a key protection that the California Legislature intends to provide to DoubleVerify and companies like it – the ability to quickly and inexpensively obtain dismissal of meritless lawsuits designed to punish them for the important work they do in helping Amici and other companies combat piracy and avoid other inappropriate or undesirable speech on the Internet.

Meritless lawsuits have a pernicious effect on speech rights. As the U.S. Supreme Court has recognized, "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution [of a lawsuit], unaffected by the prospects of its success or failure." Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). Because of the high cost of litigation, publishers of expressive works "will tend to become self-censors" unless they "are assured freedom from the harassment of lawsuits[.]" Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966). See also Winter v. DC Comics, 30 Cal. 4th 881, 891 (2003) ("[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable" (citations omitted)).

The California Legislature has recognized the danger posed by lawsuits arising from the exercise of First Amendment rights. In 1992, it enacted California's anti-SLAPP statute, C.C.P. § 425.16, to provide a mechanism for the "early dismissal of unmeritorious claims" that "interfere with the valid exercise of the constitutional rights of freedom of speech and petition." Five years later, responding to court decisions that narrowed its application, the Legislature amended the statute, declaring expressly that it "shall be construed broadly." C.C.P. § 425.16(a).

Notwithstanding this unequivocal mandate, and despite decisions from this Court re-affirming its intended breadth, Plaintiff/Petitioner urges an impermissibly narrow interpretation of the anti-SLAPP statute, which would deny its protection to all speech in a purported commercial setting. Consistent with the previous opinions of this Court – which have repeatedly recognized that the anti-SLAPP statute is to receive a broad construction – this Court should reject this restrictive reading of the statute, in favor of an interpretation more consistent with the statute's express language and legislative history, and with its underlying goal of providing broad protection for free speech rights.

I.

SUMMARY OF ARGUMENT.

DoubleVerify and companies like it provide a critical service to Amici and others that seek a robust online advertising ecosystem that supports legitimate commerce. Countless websites have built business models based on piracy and – much like legitimate websites – they rely on advertising dollars for their income. These websites can successfully monetize their piracy because many Internet advertisements are not placed via direct arrangements between the site and the advertiser, but instead through automated transactions, often involving multiple entities that stand between the brand seeking to advertise its products or services and the web site on which the ad ultimately appears.

Typically, the brand or its advertising agency does not manually select the individual web sites on which its ads appear. Instead, computer algorithms managed by entities known as digital advertising networks or exchanges determine where advertisements will be placed. One by-product of this practice is the possibility that ads get placed on sites with which the advertiser does not wish to be associated, because such sites are engaged in illegal or inappropriate activity, such as fraud, dissemination of malware, display of pornography, or copyright infringement, or the site contains content not otherwise appropriate for the advertiser (such as an

advertisement for a Disney animated film appearing on a website with adult content).

Along with other Digital Advertising Assurance Providers ("DAAPs"), DoubleVerify researches and analyzes millions of sites on the Internet to identify websites with illegal or undesirable content, so that companies know before they spend what their advertising dollars will support. This information allows brands and other participants in the online advertising ecosystem to make informed decisions – ensuring that their money does not inadvertently support or associate their brands with content that they deem harmful or inappropriate. Armed with the information DoubleVerify provides, brands can provide instructions to the digital advertising networks about where their ads should – and should not – appear.

Plaintiff FilmOn.com operates a website with which some companies may wish to avoid associating their brands. DoubleVerify's investigation determined that Plaintiff's website was associated with copyright infringement and adult content, and it reported this information to its clients. Not surprisingly, FilmOn objected to the transparency – and the ability to hold FilmOn accountable for its content choices – that DoubleVerify's report provided to FilmOn's potential advertisers. And so FilmOn sued. But California's Legislature has provided protection to

companies like DoubleVerify, to ensure that their work is not chilled by meritless lawsuits designed to punish them for speech that serves the public interest – California's anti-SLAPP statute, Code of Civil Procedure § 425.16.

FilmOn's attempts to escape the anti-SLAPP statute should be rejected. As an initial matter, the premise of its Petition for Review is simply wrong. DoubleVerify's reports are not commercial speech – speech "proposing a commercial transaction" or tied to "the economic interests of the speaker and its audience." Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 561, 562 (1980). They are not advertisements or other speech intended to promote the sale of products – they are the product, much like Amici's news programs and motion pictures are their products. FilmOn does not cite a single case extending the commercial speech label to speech similar to the informational reports that DoubleVerify provides to clients. This Court should not be the first. Indeed, FilmOn's proposed expansion of the commercial speech doctrine could deprive many speakers of the SLAPP protection the Legislature intends for them, including news subscription services and database-driven websites such as Facebook and Twitter. For this reason alone, the Court should reject FilmOn's arguments. Section II, infra.

The Court also should reject FilmOn's claims because they would drastically narrow California's anti-SLAPP statute, contrary to the Legislature's unambiguous directive that it be broadly construed. C.C.P. § 425.16(a). Since its inception, the anti-SLAPP statute has applied to speech in a commercial setting, so long as it meets the statutory requirements. E.g., Wilcox v. Superior Court, 27 Cal. App. 4th 809 (1994), disapproved on other grounds, Equilon Enterprises, LLC v. Consumer Cause, Inc., 29 Cal. 4th 53 (2002). While the Legislature chose to narrow the statute for some – but not all – commercial speech, at the same time it reiterated its intent that the anti-SLAPP statute be broadly applied to protect all speech that involves a public issue, or is in the public interest. FilmOn's decision not to invoke the Legislature's narrow exception to the anti-SLAPP statute, C.C.P. § 425.17(c), certainly was not an accident. FilmOn cannot meet its strict standards. It has given this Court no reason to create a new exception – one not intended by the Legislature – for speech that purportedly arises in a commercial setting. Section III, infra.

DoubleVerify's reports plainly are in the public interest. In today's complicated media environment, information that aids businesses in engaging in socially and fiscally responsible advertising decisions is vital. Recent boycott efforts – often focused on brands that advertise on websites offering content some consumers consider offensive – have highlighted the

importance of companies understanding, anticipating and being responsive to customer demands. Of particular interest to Amici, DAAPs give companies the background they need about websites that traffic in illegal or irresponsible content, so that Amici can avoid having their advertisements appear on those sites. For this and many other reasons, DoubleVerify's reports are entitled to the full protection of California's anti-SLAPP statute. Section V, infra.

II.

DOUBLEVERIFY'S REPORTS ARE NOT COMMERCIAL SPEECH.

FilmOn's arguments in this Court depend entirely on its assertion that DoubleVerify's reports are commercial speech, entitled to reduced First Amendment protection. They are not. This Court should reject FilmOn's arguments – and affirm the appellate court's decision – because the essential premise of its arguments is flawed.

In Kasky v. Nike, Inc., 27 Cal. 4th 939, 960 (2002), this Court adopted a three element, limited purpose test for deciding whether speech is commercial, directing courts to consider: (1) the speaker; (2) the intended audience; and (3) the content of the message. As the Court explained, generally, the speaker is "likely to be someone engaged in commerce – that is, generally, the production, distribution, or sale of goods or services – or

someone acting on behalf of a person so engaged." Id. The intended audience is "likely to be actual or potential buyers or customers of the speaker's goods or services," or those acting on their behalf, "such as reporters or reviewers" who are "likely to repeat the message to or otherwise influence actual or potential buyers or customers." Id.

Finally – and critically – the content of the message must be commercial in nature. Id. at 961. Speech is commercial when it "consists of representations of fact about the business operations, products, or services of the speaker" and is "made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." Id. (emphasis added). As the Court explained, "[t]his is consistent with, and implicit in, the United States Supreme Court's commercial speech decisions, each of which has involved statements about a product or service, or about the operations or qualifications of the person offering the product or service." Id. (emphasis added; citing Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); Ibanez v. Florida Dept. of Bus. & Prof. Reg., Board of Accountancy, 512 U.S. 136 (1994); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976)). Concluding that this test is consistent with U.S. Supreme Court decisions that have focused on the speaker's promotion of products or services, the Court reiterated that an essential element of commercial speech, at least in the context of laws

aimed at protecting consumers, is a factual representation "about the business operations, products, or services of the speaker..., made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." Kasky, 27 Cal. 4th at 961-62.

The Court's decision built on the United States Supreme Court's commercial speech jurisprudence. That Court consistently has held that commercial speech, at its core, is "speech proposing a commercial transaction." Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980); see also Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (commercial speech is "speech which does no more than propose a commercial transaction") (internal marks and citations omitted). Indeed, this "is what defines commercial speech." Board of Trustees v. Fox, 492 U.S. 469, 482 (1989). While the Court has acknowledged the potential relevance of other considerations, e.g., Central Hudson, 447 U.S. at 561, those considerations necessarily are tied to "the economic interests of the speaker and its audience" (id.).[1]

[1] In Beeman v. Anthem Prescription Management, LLC, 58 Cal. 4th 329 (2013), this Court explained that commercial speech is, at a minimum, "expression related solely to the economic interests of the speaker and its audience." Id. at 352 (citing Central Hudson, 447 U.S. at 561.) The compelled speech at issue there – requiring prescription drug processers to include pricing information in communications with clients – was commercial because it related to the economic interests of the sender and recipient, and was "linked inextricably to government-regulated health

Amici are aware of no other case in which a report, article, or other expressive work has been designated as "commercial speech," even if the author or creator is compensated for the work. And for good reason. It long has been the law that it is irrelevant whether the expression at issue is sold for profit. Time, Inc. v. Hill, 385 U.S. 374, 397 (1967); Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 678 (2010). In U.D. Registry, Inc. v. State of California, 34 Cal. App. 4th 107 (1995), for example, the appellate court held that the consumer credit reports at issue there were not commercial speech. Id. at 111. It explained that "[t]he fact that UDR sells the information does not transform it to commercial speech any more than the fact that a magazine or newspaper is sold makes its contents commercial speech." Id. Indeed, "'[s]ome of our most valued forms of fully protected speech are uttered for a profit.'" Id. (citing Board of Trustees v. Fox, 492 U.S. at 482). See also Spiritual Psychic Sci. Church of Truth, Inc. v. City of Azusa, 39 Cal. 3d 501, 511 (1985), disapproved on other grounds Kasky, 27 Cal. 4th 939 (fortune-telling for a fee is not commercial speech);[2] City of Alameda v. Premier Comm'n Network, Inc.,

---

insurance transactions" enacted to prevent commercial harms. Id. Here, in contrast, as discussed below, the reports at issue are DoubleVerify's product, designed to aid businesses in ensuring that their advertising dollars do not support websites with inappropriate content. Section V, infra.

[2] Cf. Argello v. City of Lincoln, 143 F.3d 1152, 1153 (8th Cir. 1998) ("there is a distinct difference between the offer to tell a fortune ('I'll tell

156 Cal. App. 3d 148, 152 (1984) (First Amendment protects speech sold to subscribers – there, motion pictures, news and related information sold through television subscription service); Hilton v. Hallmark Cards, 599 F.3d 894, 905 n.7 (9th Cir. 2010) (greeting card with celebrity's likeness is not commercial speech because the "card is not advertising the product; it *is* the product. It is sold for a profit, but that does not make it commercial speech for First Amendment purposes" (original emphasis)).

The Eleventh Circuit's decision in Tobinick v. Novella, 848 F.3d 935 (11th Cir. 2017), is instructive. There, the Court dismissed Lanham Act claims against a doctor based on two blog posts criticizing another doctor. Id. at 949-52. In doing so, the Court rejected plaintiff's argument that the posts were commercial speech merely because the defendant profited from them, explaining:

> To be sure, neither the placement of the articles next to revenue-generating advertising nor the ability of a reader to pay for a website subscription would be sufficient in this case to show a liability-causing economic motivation for Dr. Novella's informative articles. Both advertising and subscriptions are typical features of newspapers, whether online or in-print. But, the Supreme Court has explained that "[i]f a newspaper's profit motive were determinative, all aspects of its operations – from the selection of news stories to the choice of editorial position – would be subject to regulation if it could be established that they were conducted

---

your fortune for $20.'), which is commercial speech, and the actual telling of the fortune ('I see in your future. ...') which is not" (quoting trial court)).

> with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment." Indeed, "magazines and newspapers often have commercial purposes, but those purposes do not convert the individual articles within these editorial sources into commercial speech. ... Even if Dr. Novella receives some profit for his quasi-journalistic endeavors as a scientific skeptic, the articles themselves, which never propose a commercial transaction, are not commercial speech simply because extraneous advertisements and links for memberships may generate revenue.

Id. at 952 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)). Accord Commodity Futures Trading Comm'n v. Vartuli, 228 F.3d 94, 108-10 (2d Cir. 2000) (distinguishing between advertising for software program, which was commercial speech, and the statements generated and conveyed by the software itself, which were not commercial speech).[3]

Under the precedent discussed above, DoubleVerify's reports about the content of websites are unambiguously ***non***-commercial speech. Even if DoubleVerify and its client meet Kasky's "speaker" and "intended

---

[3] See also Dex Media West, Inc. v. City of Seattle, 696 F.3d 952, 963-64 (9th Cir. 2012) (yellow page directories were non-commercial speech; "economic motive in itself is insufficient to characterize a publication as commercial" even where "commercial content is published alongside noncommercial content"); Browne v. Avvo, Inc., 525 F. Supp. 2d 1249, 1254 (W.D. Wash. 2007) (finding it "hard to imagine how an information clearinghouse and/or ratings service could be considered 'commerce'"); Stephens v. Am. Home Assur. Co., 23 Media L. Rep. 1769, 1995 WL 230333, *6 (S.D.N.Y. 1995) (annual ratings of insurance companies, distributed to subscribers, were protected by First Amendment privilege).

audience" elements, the content of the message plainly is not "commercial" as defined by this Court and the U.S. Supreme Court. The reports do not consist of representations of fact about the business operations, products, or services of DoubleVerify itself, or a competitor. Rather, they focus solely on FilmOn's (and millions of other sites') business operations, products, and services. Id. They do not propose a commercial transaction, nor are they designed to promote DoubleVerify through an influence campaign, or to increase the sales of its product (beyond any business' goal of providing a valuable service to its clients).

Instead, the reports are an amalgamation of information and data that DoubleVerify has gathered regarding third-parties, none of whom are customers, potential customers, or competitors. 1:AA:064-065, 072. DoubleVerify provides a service that, as discussed below, gives businesses critical information to help them decide where their advertising dollars should be spent – and therefore, which businesses, and business models, their money helps to advance. It is a personalized reporting service that assists its customers in making better business choices (e.g., where to advertise and where not to advertise).

A conclusion that these reports are commercial speech would vastly widen the scope of the third Kasky element, depriving a broad array of speech of the First Amendment protections that they currently enjoy.

FilmOn's focus on the fact that DoubleVerify charges for access to its reports would capture the Wall Street Journal and Barron's – both of which have robust paywalls and provide information used by businesses worldwide – but plainly are not commercial speech.[4] Indeed, many content providers are recognizing the value of subscription services to provide customers with an ad-free – but personalized – experience.[5] For example, Apple soon will be launching a news subscription service, which, for a small fee, will provide news and information to subscribers.[6] Nor is it relevant that DoubleVerify provides individualized information to its subscribers. On the contrary, many websites provide individual-specific

---

[4] See Our Products, Dow Jones & Co., available at https://www.dowjones.com/product-category/all/ (visited May 21, 2018). See also "Energy Central Professional Subscriptions," Energy Central, available at http://pro.energycentral.com/membership/subscribe.cfm (visited May 21, 2018) (subscription service for energy industry news and information); "Subscription Services," Global Custodian, available at https://www.globalcustodian.com/subscription-services/ (visited May 21, 2018) (subscription service for international securities news and information).

[5] See Tien Tzuo, "Why Newspaper Subscriptions Are on the Rise," TechCrunch, available at https://techcrunch.com/2017/03/04/why-newspaper-subscriptions-are-on-the-rise/ (visited May 21, 2018) (noting that "[t]he behavioral insight that comes with membership plans and paywalls helps newspapers move away from empty calories like slideshow page views toward more valuable engagement metrics like time spent").

[6] See Gurman & Smith, "Apple Is Planning to Launch a News Subscription Service," Bloomberg (Apr. 17, 2018), available at https://www.bloomberg.com/news/articles/2018-04-17/apple-is-said-to-plan-apple-music-like-news-subscription-service (visited May 21, 2018).

feeds, which vary for each user. One obvious example is Facebook, which uses algorithms, in part, to better connect businesses with users who may be interested in their products.[7] Thus, each Facebook user sees a unique feed, based on his or her own activity and preferences. So too with Twitter.[8] This personalized information makes it easier for many users to find material relevant and useful to them, in the sea of information available today.

FilmOn asks this Court to grossly expand the definition of commercial speech in California. No law supports its request. Amici respectfully request the Court to reject FilmOn's arguments, and affirm the appellate opinion that the anti-SLAPP statute applies to FilmOn's claims.

---

[7] See Brian Peters, "The New Facebook Algorithm: Secrets Behind How It Works and What You Can Do To Succeed," Buffer, Social (Feb. 8, 2018), available at https://blog.bufferapp.com/facebook-algorithm (visited May 21, 2018).

[8] See Alfred Lua, "How the Twitter Timeline Works (and 6 Simple Tactics to Increase Your Reach)," Buffer, Social (Upd. Apr. 29, 2017), available at https://blog.bufferapp.com/twitter-timeline-algorithm (visited May 21, 2018).

III.

BY ITS PLAIN LANGUAGE, THE ANTI-SLAPP STATUTE PROTECTS SPEECH THAT MAY OCCUR IN COMMERCE.

A. FilmOn's Interpretation Is Contrary To The Legislature's Mandate For Broad Construction Of The Anti-SLAPP Statute.

As DoubleVerify explains in its Answer Brief, Section 425.16(e) identifies four areas of protected activity, none of which explicitly or implicitly requires the court to consider the commercial nature of the speech. A.B. at 27-28, citing C.C.P. § 425.16(e). Those four areas provide the "only means" for determining whether speech is protected. Equilon Enterprises, LLC v. Consumer Care, Inc., 29 Cal. 4th 53, 66 (2002); Montebello v. Vasquez, 1 Cal. 5th 409, 422 (2016). Noticeably missing from Section 425.16(e) is any reference to whether or not the speech arose in a business setting.

Any doubt about the Legislature's intent as to the broad or narrow construction of the anti-SLAPP statute was eliminated in 1997, when the Legislature responded to court decisions narrowly applying the statute by amending Section 425.16 to declare plainly that it "shall be construed broadly." C.C.P. § 425.16(a) (emphasis added). As this Court held in its first decision interpreting the anti-SLAPP statute, this legislative direction "is expressed in unambiguous terms," and must be treated as "conclusive." Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1119-20

(1999) (citation omitted); see also Equilon, 29 Cal. 4th at 61-62; Sipple v. Foundation for Nat'l Progress, 71 Cal. App. 4th 226, 236 (1999) (noting Legislature's intent that anti-SLAPP statute be construed broadly).

In amending Section 425.16, the Legislature responded to court decisions that had narrowly interpreted the statute, including the First District's opinion in Zhao v. Wong, 48 Cal. App. 4th 1114 (1996), disapproved, Briggs, 19 Cal. 4th 1106. There, the court had concluded that "the Legislature never contemplated that the statute would apply 'broadly' to First Amendment rights." Id. at 1129. The court construed the prior version of Section 425.16 to require any statement made before an official proceeding to also be in connection with a public issue – despite the fact that the provision "contain[ed] no reference to 'public issue' or an equivalent phrase." Id. at 1127. The court also found that the "Legislature contemplated that the statute would apply only to a limited sphere of activities covered by certain protections of the First Amendment, i.e. activities described by the statement of legislative purpose." Id. at 1129.

The Legislature acted quickly to reject the First District's narrow interpretation of the anti-SLAPP statute. DoubleVerify's Request for Judicial Notice ("RJN") Ex. J at 3. The 1997 amendment "sought to overturn cases that were thought by its supporters to be unduly limiting the reach of the anti-SLAPP law." RJN Ex. K at 4. As Senate and Assembly

analyses explained: "[S]ome courts have failed to understand that this statute covers any conduct in furtherance of the constitutional rights of petition and of free speech in connection with a public issue or with any issue of public interest." RJN Ex. G at 2 (emphasis added). Supporters lauded the proposed Bill, asserting that "the additional declaration of Legislative intent would strengthen the statute against narrow readings of its protections, which in turn would better protect a person's exercise of his or her constitutional rights of petition and free speech in matters of public significance against meritless claims designed to stifle that exercise." RJN Ex. H at 3.

Following the 1997 amendment, in accordance with this legislative mandate, this Court consistently has upheld the statute's broad construction and rejected attempts to impose limits on Section 425.16 that are unsupported by its language or history. E.g., Equilon, 29 Cal. 4th at 61 (rejecting "intent to chill" requirement); Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 735 (2003) (adhering to the "express statutory command" that the anti-SLAPP statute be "construed broadly"); Soukop v. Law Offices of Herbert Hafif, 39 Cal. 4th 260, 279 (2006) (because "the Legislature has directed that the statute 'be construed broadly,'" courts must follow that intent); Kibler v. Northern Inyo County Local Hospital Dist., 39 Cal. 4th 192, 199 (2006) (broadly construing the anti-SLAPP

statute to apply to statements made in hospital peer review proceedings); Taus v. Loftus, 40 Cal. 4th 683, 712-13 (2007) ("there can be no question but that defendants' general course of conduct" in researching and publishing article was protected by anti-SLAPP statute); Club Members For An Honest Election v. Sierra Club, 45 Cal. 4th 309, 318 (2008) (because anti-SLAPP statute must be construed broadly, exemptions must be construed narrowly); Vargas v. City of Salinas, 46 Cal. 4th 1, 19 (2009) (broad interpretation required conclusion that statute applies to claims against government officials); Simpson Strong-Tie Co., Inc. v. Gore, 49 Cal. 4th 12, 21-22 (2010) (broad construction of anti-SLAPP statute requires narrow construction of its exemptions, including the commercial speech exemption); Montebello, 1 Cal. 5th at 422 ("[t]he Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition. It went on to include 'any act ... in furtherance of' those rights" (original emphasis; citing C.C.P. § 425.16(b)(1)); Barry v. State Bar of California, 2 Cal. 5th 318, 321 (2017) (refusing to limit fee recovery under Section 425.16(c), explaining that "[t]he statute instructs that its provisions are to be 'construed broadly'").

In addition, to prevent plaintiffs from using artful pleading to evade the anti-SLAPP statute, this Court also has made clear that the statute's application does not depend on the particular nomenclature used by the

plaintiff; instead, if a claim arises from conduct in furtherance of free speech "in connection with a public issue," C.C.P. § 425.16(b)(1), it falls within the scope of the statute regardless of its label. See, e.g., Navellier v. Sletten, 29 Cal. 4th 82, 92 (2002) (SLAPP statute's "definitional focus is not the form of the plaintiff's cause of action, but rather, the defendant's activity that gives rise to his or her asserted liability"; "categorically" excluding contract and fraud causes of action from the anti-SLAPP statute's ambit "would contravene the Legislature's express command that section 425.16 'shall be construed broadly'") (original emphasis); Baral v. Schnitt, 1 Cal. 5th 376, 392 (2016) (appellate court's "refusal to permit anti-SLAPP motions to reach distinct claims within pleaded counts undermines the central purpose of the statute: screening out meritless claims that arise from protected activity, before the defendant is required to undergo the expense and intrusion of discovery"); see also Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 652 (1996), disapproved on other grounds, Equilon, 29 Cal. 4th 53 ("the nature ... of the action is not what is critical"; if it arises from protected conduct, it is subject to a SLAPP motion). As a result, California courts have applied the statute to a wide variety of claims, including breach of contract and fraud (Navellier, 29 Cal. 4th at 86, 91-92), invasion of privacy (Taus, 40 Cal. 4th at 712), misappropriation (Stewart, 181 Cal. App. 4th at 669), and emotional

distress (Briggs, 19 Cal. 4th at 1115; Wong v. Jing, 189 Cal. App. 4th 1354, 1360 (2010)), among others.

Importantly, courts also consistently have applied the anti-SLAPP statute to disputes that arise in a commercial setting. Indeed, one of the earliest SLAPP decisions involved a business dispute between competing shorthand reporters. Wilcox v. Superior Court, 27 Cal. App. 4th 809 (1994), disapproved on other grounds, Equilon, 29 Cal. 4th 53. The Legislature specifically approved of this decision in 2003, when it enacted the legislation discussed in Section IV, below, as an example of the proper application of the anti-SLAPP statute. RJN Ex. K at 3. As the Wilcox Court explained in the passage invoked by the Legislature, business torts such as interference with prospective economic advantage are among the favored causes of action in SLAPP suits. Id., citing Wilcox, 27 Cal. App. 4th at 816.

A recent decision by the First District Court of Appeal is instructive. In Dean v. Friends of Pine Meadow, 21 Cal. App. 5th 91 (2018), the public issue concerned a land development process and the defendants' attempts to challenge that process. Id. at 99. The court affirmed the trial court's finding that defendants' challenge to the development plans constituted speech and activity in furtherance of an issue of public interest, explaining that "plaintiffs' complaint is a paradigm of the problem that section 425.16

was designed to address." Id. at 102. It then rejected the plaintiff's argument that the defendants' statements were commercial speech, outside the scope of the anti-SLAPP statute's protections. Id. at 105-06. The court explained that "a plaintiff cannot preclude a defendant from establishing that a cause of action arises out of protected activity simply by alleging there is some commercial element to the parties' dispute. Rather, the question whether a defendant has met its burden under section 425.16, subdivision (b) is answered by applying section 425.16, subdivision (e)." Id. at 105.

The Dean court concluded that defendants' statements were not commercial speech. 21 Cal. App. 5th at 104. It then considered and categorically rejected the argument FilmOn makes here despite the fact that it did not invoke the Section 425.17(c) commercial speech exemption (O.B. at 20-22) – that "all commercial speech is excluded from anti-SLAPP protection." Id. at 105-06. It explained that plaintiff's "reasoning is flawed for at least two reasons." Id. at 106. "First, while 'commercial speech receives a lesser degree of constitutional protection than many other forms of expression,' ..., commercial speech is not completely excluded from the realm of First Amendment protection ...." Id. "Second, as [this] Court explained in Montebello, '[t]he Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of

speech and petition. It went on to include "any act ... in furtherance of" those rights.'" Id. (citing Montebello, 1 Cal. 5th at 421).

Following the Legislature's mandate for broad construction of the anti-SLAPP statute, the appellate court concluded 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. (citing Montebello, 1 Cal. 5th at 421). See also Paulus v. Bob Lynch Ford, Inc., 139 Cal. App. 4th 659 (2006) (anti-SLAPP statute applied to malicious prosecution action based on complaint filed in business dispute); Mission Oaks Ranch, Ltd. v. County of Santa Barbara, 65 Cal. App. 4th 713, 728 (1998) overruled on other grounds, Briggs, 19 Cal. 4th 1106 (anti-SLAPP statute applied to lawsuit based on defendant's conduct as paid environmental consultant); Taheri Law Group v. Evans, 160 Cal. App. 4th 482, 489 (2008) (anti-SLAPP statute applied to claims by law firm against attorney accused of stealing clients); Bel Air Internet, LLC v. Morales, 20 Cal. App. 5th 924, 945-46 (2018) (anti-SLAPP statute applied to claim for interference with contractual relations); Integrated Healthcare Holdings, Inc. v. Fitzgibbons, 140 Cal. App. 4th 515, 525-26 (2006) (anti-SLAPP statute applied to claims based on private e-mail to medical executive committee members and others regarding financial stability of entity that took over management of the hospital, by former

competitor to that entity); Hailstone v. Martinez, 169 Cal. App. 4th 728, 736 (2008) (anti-SLAPP statute applied to claims based on letter accusing union's senior business agent of double dipping).

In Equilon, this Court firmly refused to "judicial[ly] impos[e]" any extra-statutory requirement to satisfy the anti-SLAPP statute's first prong because to do so "would contravene legislative intent by modifying the detailed remedial scheme the Legislature laid out in the statute's operative sections." 29 Cal. 4th at 61. So too here. This Court should not judicially impose a nebulous "speech in a commercial setting" exception to the protections of the anti-SLAPP statute because doing so would contravene the language of the statute as well as the Legislature's express intent, and modify its remedial scheme in a manner that would erode free speech protections in California.

B. FilmOn's Interpretation Of The Public Interest Requirement Would Subvert The Legislature's Intent.

FilmOn's interpretation of what qualifies as a public issue under the anti-SLAPP statute is contrary to the broad interpretation mandated by the Legislature, and repeatedly affirmed by this Court. Because Section 425.16 "shall be construed broadly" to safeguard the "valid exercise of the constitutional rights of freedom of speech" (Nygård, Inc. v. Uusi-Kerttula, 159 Cal. App. 4th 1027, 1039 (2008)), the statute protects "even private

communications, so long as they concern a public issue." Terry v. Davis Community Church, 131 Cal. App. 4th 1534, 1546 (2005). Thus, the "public interest" inquiry centers on the content of the speech, and not on the location of or medium for the speech, or even the number of participants in the speech. Navellier, 29 Cal. 4th at 90-91 ("we have declined to hold that section 425.16 does not apply to events that transpire between private individuals").

Indeed, even speech to a single person can receive anti-SLAPP protection. For example, in Averill v. Superior Court, 42 Cal. App. 4th 1170 (1996), a charitable organization sued a homeowner for slander when the homeowner asked her employer not to support the charitable organization's plan to open a battered women shelter in her neighborhood. The slander claim was based on comments made only to the homeowner's employer. Id. at 1173. The court concluded that because the private communication arose in the context of a public issue – the placement of a shelter in the homeowner's neighborhood – the anti-SLAPP statute protected the speech.

As the appellate court explained in Nygård, "Section 425.16 does not define 'public interest,' but its preamble states that its provisions 'shall be construed broadly' to safeguard 'the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.'

(§ 425.16, subd. (a).)" 159 Cal. App. 4th at 1039. The Nygård court also found that an issue of public interest within the meaning of the anti-SLAPP statute "is any issue in which the public is interested." Id. (finding private residence of Finnish designer related to issue of "public interest"). See also Seelig v. Infinity Broadcasting, 97 Cal. App. 4th 798, 807-08 (2002) (radio host's criticism of reality television show contestant addressed matter of public interest; court noted "popular cultural phenomena" of "[r]eality television and talk radio"); Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 481 (2000) (public interest "has been broadly construed to include ... private conduct that impacts a broad segment of society"); Hecimovich v. Encinal Sch. Parent Teacher Org., 203 Cal. App. 4th 450, 464 (2012) ("the question whether something is an issue of public interest must be construed broadly" (citation omitted)); Hilton, 599 F.3d at 905-06 (defendants' activities "need not involve questions of civic concern; social or even low-brow topics may suffice").

Broad topics deemed to be of public interest have included, among many others, domestic violence (Sipple v. Foundation for Nat. Progress, 71 Cal. App. 4th 226, 238 (1999)); sexual abuse in youth sports (M.G. v. Time Warner, Inc., 89 Cal. App. 4th 623, 623 (2001)); treatment for depression (Rivera v. First DataBank, Inc., 187 Cal. App. 4th 709 (2010)); diet supplements (Nagel v. Twin Laboratories, Inc., 109 Cal. App. 4th 39

(2003)); product quality (Wilbanks v. Wolk, 121 Cal. App. 4th 883 (2004)); plastic surgery (Gilbert v. Sykes, 147 Cal. App. 4th 13 (2007)); and college football (McGarry v. University of San Diego, 154 Cal. App. 4th 97 (2007)). Playing music even qualified as a topic of public interest, because recordings "are culturally valuable to society." Flo & Eddie, Inc. v. Pandora Media, Inc., No. CV 14-7648 PSG (RZx), 2015 U.S. Dist. LEXIS 70551 (C.D. Cal. Feb. 23, 2015); see also Kronemyer v. Internet Movie Database Inc., 150 Cal. App. 4th 941 (2007) ("motion picture My Big Fat Greek Wedding was a topic of widespread public interest" under anti-SLAPP statute).

These decisions are consistent with the Legislature's intended broad construction of the anti-SLAPP statute generally and the public interest requirement specifically. By its plain language, the anti-SLAPP statute applies here.

IV.

SECTION 425.17 DEFINES THE COMMERCIAL SPEECH THAT IS EXEMPTED FROM THE ANTI-SLAPP STATUTE.

FilmOn effectively concedes that it cannot satisfy the requirements of the anti-SLAPP statute's commercial speech exemption, Section 425.17(c), and it cannot deny that it did not invoke Section 425.17(c) below. R.B. at 13, 16-17. As DoubleVerify explains in its Answering

Brief, this Court should reject FilmOn's invitation to create a brand new "speech in a commercial setting" exemption to the anti-SLAPP statute. The Legislature already defined the commercial speech it intends courts to exempt from the protection of Section 425.16. A.B. at 26-27. This intent is clearly identified in the preamble to Section 425.17, which reads:

> The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. 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 or Section 425.16.

Cal. Code Civ. Proc. §425.17(a) (emphasis added). As the Legislature made clear, any interpretation of Section 425.17(c) must adhere to the overarching goal of ensuring the continued protection of speech and petition in California. See Club Members for an Honest Election v. Sierra Club, 45 Cal. 4th 309, 316, 319 (2008) (the "public interest" exemption found in CCP 425.17(b) should be narrowly construed to ensure the broad protection of the anti-SLAPP statute).

The analysis of the Senate Judiciary Committee, which was responsible for drafting Senate Bill 515 (the legislation that became Section 425.17), discussed the narrow intent of the statute's drafters, stating that the Bill would "exempt lawsuits based on defendant's acts that would be

categorized as commercial speech." RJN Ex. K at 7 (emphasis added). As one court explained, "the legislative history of the commercial speech exemption to the anti-SLAPP statute confirms the Legislature's intent to except from anti-SLAPP coverage disputes that are purely commercial." Taheri Law Group v. Evans, 160 Cal. App. 4th 482, 491 (2008) (emphasis added); see also Navarro v. IHOP Properties, Inc., 134 Cal. App. 4th 834, 840-41 (2005). Importantly, the Legislature exempted some – but not all – commercial speech from the anti-SLAPP statute's reach. As this Court recognized, "the Legislature appears to have enacted section 425.17, subdivision (c), for the purpose of exempting from the reach of the anti-SLAPP statute cases involving comparative advertising by businesses." Simpson Strong-Tie, 49 Cal. 4th at 32-33 (2010) (citation omitted).

In crafting Section 425.17(c), the Legislature "closely track[ed] Kasky's guidelines on commercial speech, focusing on the speaker, content of the message, and the intended audience." RJN Ex. O at 6. Thus, the Bill "exempt[s] from the anti-SLAPP motion only causes of action where the speaker is a person primarily engaged in the business of selling or leasing goods or services" and the content of the speech contains "representations of fact about that person's or a business competitor's business operations" which are made "for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's

goods or services." Id. (emphasis added). In discussing the "factual content" element, the Legislature echoed this Court's language from Kasky, explaining:

> Finally, the factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services.

RJN Ex. O at 6. Thus, at bottom, SB 515 was designed to apply to "speech intended to persuade an audience to buy one product instead of another" because it is "clearly more in furtherance of business considerations and may be characterized as commercial speech which does not enjoy full constitutional first amendment protection." RJN Ex. K at 5-6.

Critically, a year before enacting SB 515, the Legislature rejected a bill that would have exempted a broader array of business speech from the anti-SLAPP statute's protection. Under SB 1651 (2001-2002), the anti-SLAPP statute would not have applied to "[a]ny cause of action against any manufacturer, wholesaler, retailer, or other entity involved in the stream of commerce, arising from any statement, representation, conduct, label, advertising, or other communication, made in regard to the product, services, or business operations of that person or entity or any competitor." Amici's Concurrently-Submitted Request for Judicial Notice ("Amici

RJN") at 12. The Legislature concluded, however, that the proposed exclusions in SB 1651 were "over-inclusive" and capable of raising "both constitutional and policy concerns." Amici RJN at 21.

In discussing the constitutional concerns, the Legislature explained that the "equal protection guarantee of the United States Constitution requires some rational state purpose for treating statements and conduct by businesses different from statements and conduct by others." Id. It noted that no rationale had been offered for the proposed distinction between individual and business speakers, and that for speech protected by the First Amendment, "the identity of the speaker is not usually a proper consideration in regulating speech." Id. (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)). As to the policy concerns, the Legislature found "troubling" SB 1651's failure to "distinguish between conduct that may well fall within the paradigm of a SLAPP, as opposed to simple commercial speech intended to further the speaker's business interest." Id. Ultimately, the Legislature refused to advance a Bill that would exempt all speech in a commercial setting from the anti-SLAPP statute's protection.[9]

---

[9] The Legislature passed a different Bill – SB 789 – but it was vetoed by the Governor. RJN Ex. L at 3; see Information for SB 789, California Legislative Information, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200120020SB789.

In the legislative history for SB 515, the Legislature discussed its earlier rejection of SB 1651, explaining that it chose instead to adopt a more measured approach, that looks at the "content and context of the statement or conduct ... rather than enacting a wholesale exclusion of a class of defendants which had been proposed in SB 1651." RJN Ex. K at 5. In addition, "[t]he failure of that proposal to distinguish between conduct that may well fall within the paradigm of a SLAPP, as opposed to simple commercial speech intended to further the speaker's business interest, was also troubling." RJN Ex. K at 6. This legislative history squarely refutes the interpretation FilmOn urges here.

Lower court analyses of Section 425.17 also confirm the legislative intent to provide for one narrow exemption for purely commercial speech. As one court explained, "all of the speech exempted from the anti-SLAPP statute [under Section 425.17(c)] is commercial speech, but not all commercial speech is exempted thereunder." All One God Faith, Inc. v. Organic & Sustainable Ind. Stds., Inc., 183 Cal. App. 4th 1186, 1217 (2010); see also id. at 1214-16 (noting Legislature's prior rejection of exemption that would have applied to any entity "involved in the stream of commerce").[10] Thus, Section 425.17(c) "simply does not provide ... that

[10] FilmOn relies heavily on OASIS, while ignoring critical differences between that case and this one – most importantly, OASIS conceded that the seals at issue were commercial speech. Id. at 1206-07;

every case arising from statements uttered by a commercial enterprise [is] exempted from the anti-SLAPP statute's purview." Mendoza v. ADP Screening & Selection Srvcs., Inc., 182 Cal. App. 4th 1644, 1652 (2010).

The court of appeal's decision in Rivera is instructive. There, the speech at issue was a pharmaceutical monograph (information pamphlet) which a pharmacy provided to a patient prescribed an antidepressant. The court held that "[t]reatment for depression is matter of public interest" and the challenged speech was protected under Section 425.16(e)(4). 187 Cal. App. 4th at 716. The court went on to hold that the speech also was not exempted from protection under Section 425.17(c). Considering the legislative history behind Section 425.17(c) and this Court's decision in Simpson Strong-Tie, the court interpreted Section 425.17(c) narrowly and strictly, rejecting its application there because "[t]he statements in the monograph are about neither defendant's business nor plaintiffs'." Id. at 717-18. See also Cross v. Facebook, Inc., 14 Cal. App. 5th 190, 203 (2017) (Section 425.17(c) did not apply to claim based on Facebook posts). Here, FilmOn proposes the same interpretation as the plaintiffs in Rivera, Simpson Strong-Tie and Cross – that any speech made by a business should

---

see A.B. at 40-42. Here, in contrast, as established in Section II, DoubleVerify's reports are not commercial speech.

be exempt from the anti-SLAPP statute. The Legislature rejected this approach and this Court should as well.

This Court repeatedly has affirmed that it will not "presume that the Legislature performs idle acts, nor [will it] construe statutory provisions so as to render them superfluous." Imperial Merchant Services, Inc. v. Hunt, 47 Cal. 4th 381, 390 (2009). Instead, courts must assume that "each term has meaning and appears for a reason." Kulshrestha v. First Union Commercial Corp., 33 Cal. 4th 601, 611 (2004). The Legislature enacted Section 425.17(c) to address a specific problem, and it precisely and narrowly defined the commercial speech that it intends to fall outside of the anti-SLAPP statute's protection. Because courts should construe every term in a statute to have meaning and appear for a reason, adopting FilmOn's approach would render 425.17 superfluous and unnecessary.

The Legislature has rejected the broad exemption that FilmOn asks this Court to adopt. FilmOn's nebulous "speech in commerce" exemption would subvert that legislative intent, impermissibly stepping into the Legislature's shoes and entering an area of SLAPP law that the Legislature expressly has filled. It would exempt a wide swath of speech from the anti-SLAPP statute's protection, merely because that speech is sold. See Section II, supra. For this independent reason, this Court should reject FilmOn's interpretation of the anti-SLAPP statute.

V.

PROMOTING TRANSPARENCY IN ADVERTISING IS AN ISSUE OF PROFOUND PUBLIC INTEREST, PARTICULARLY IN TODAY'S MEDIA ENVIRONMENT.

FilmOn tries to minimize the public interest in DoubleVerify's reports at issue here – which promote responsible business practices in advertising – in its attempt to overcome the appellate court's decision that DoubleVerify's speech deserves anti-SLAPP protection. As Amici explain below, today's media environment contains a broad array of new technologies disseminating speech in innovative and sometimes unexpected ways. Companies like DoubleVerify provide information that helps Amici and others navigate this landscape by aggressively analyzing and controlling where their advertising dollars are spent. This is an important service – plainly in the public interest – squarely within the Legislature's intent for anti-SLAPP statute protection.

An article published early last year cogently explained the problem businesses face today:

> Over the last several months, we were all schooled on the pervasiveness of fake news and the harm it can cause. With ads appearing on fake news sites or adjacent to inflammatory – and possibly fake – content, advertisers suddenly faced a new and unexpected challenge in the era of automated ad buying. How can major, big-budget advertisers achieve their goal of reaching target audiences at scale if they are

> suppressing content out of fear of authenticity and brand safety?[11]

The article discussed the need for businesses to maintain control over their advertising choices including, as one of its "three crucial steps," "layer[ing] in third-party verification technology."

The importance of monitoring website placement for advertisements has played out in a variety of ways over the past several years. An early example of the power of organized social media – and the need for businesses to be responsive to their customers' demands – manifested in the "Flush Rush" movement. In 2012, Rush Limbaugh, a provocative media personality, referred to Georgetown Law student Sandra Fluke as a "slut" and a "prostitute" after she spoke in front of Congress in favor of the Affordable Care Act contraception mandate (which Limbaugh opposed).[12] In response, a group of citizens began to identify businesses that advertised on Rush Limbaugh's broadcast and demand that they pull their advertising dollars. Id. Companies such as Netflix, J.C. Penney, Sears and many

---

[11] Eric Franchi, "How to Protect Your Brand From Landing on Bad Websites," AdAge (Jan. 4, 2017), available at http://adage.com/article/digitalnext/protecting-brands-bad-sites/307285/ (visited May 16, 2018).

[12] See Ethan Epstein, "Is Rush Limbaugh in Trouble?," Politico Magazine (May 24, 2016), available at https://www.politico.com/magazine/story/2016/05/is-rush-limbaugh-in-trouble-talk-radio-213914 (visited May 26, 2018).

others responded by directing their partners not to run advertisements on the Limbaugh broadcast. Id. The movement did lasting damage to talk radio, as revenue plummeted and some companies were even forced out of business. Id.

Since then, activists have used boycotts – sometimes very effectively – to encourage companies to actively police their advertising spending. As one author explained, "[b]rands face increasingly dangerous terrain as more consumers become willing to boycott or purchase their products based on their political or social positions. According to Edelman's 2017 Earned Brand report, 57% of consumers boycott or buy from a brand based on its position on a political or social issue, and 30 percent say they make belief-driven purchase decisions more than they did three years ago."[13]

That activism also has focused on particular media entities, to discourage spending in support of speech that activists consider harmful. For example, "Sleeping Giants" targeted advertisements placed on Breitbart.com, beginning with the simple premise that "[p]rogrammatic advertising is broken, so many advertisers end up in places where they

[13] William Comcowich, "More Consumers Boycott or Embrace Brands Based on Political & Social Issues," Glean.info (June 27, 2017), available at https://glean.info/consumers-boycott-embrace-brands-based-political-social-issues/ (visited May 26, 2018).

don't want to be w/o their knowledge."[14] Using straight-forward, polite Tweets, activists have successfully encouraged more than 4,000 companies to blacklist Breitbart.com. Id. Thus,

> Sleeping Giants has proven that the simple act of tweeting at brands – at once one of the most common and most reviled practices on the Internet today – can be a startlingly effective form of #Resistance. In the aftermath of the Parkland shooting, as social media campaigns ramp up the pressure on advertisers, sponsors, and other corporate partners to cut ties with the National Rifle Association, we spoke with the campaign to learn more about how they managed to cut the legs out from under Breitbart – and how activists might be able to accomplish something similar with the NRA, too.

Id.

In today's fast-moving online media environment, many companies rely on entities like DoubleVerify, which conduct in-depth analyses of places (generally websites) where advertising might appear, in order to assist businesses in preventing placement on websites that engage in illegal or inappropriate conduct.

For Amici, DoubleVerify and entities like it provide a particularly important service – helping them combat piracy. Websites engaged in piracy of Amici and their members' works are often funded through the

---

[14] Jay Willis, "How an Activist Group Turned to the Dark Side to Hit Breitbart Where It Hurts," GQ (March 2, 2018), available at https://www.gq.com/story/sleeping-giants-breitbart-nra-interview (visited May 26, 2018).

sale of space for display of third-party advertisements.[15] Ads on these sites are typically placed through automated transactions – usually involving multiple layers of companies between the brand seeking to advertise its products or services, and the website on which its advertisements may appear – rather than via direct arrangements between the site and the advertiser. In these arrangements, the brand or its advertising agency rarely select the individual web sites on which the ads appear. Instead, computer algorithms, managed by entities known as digital advertising networks or exchanges, determine where the advertisement will appear – a process known as "programmatic advertising."[16] Because of this, ads often get placed on websites engaged in illegal or inappropriate activity – such as fraud, dissemination of malware, display of pornography, or copyright infringement – with which the advertiser does not wish to be associated.[17]

---

[15] See "Good Money Gone Bad: Digital Thieves and the Hijacking of the Online Ad Business: A Report on the Profitability of Ad-Supported Content Theft," Digital Citizens Alliance (Feb. 2014), at 8, available at http://www.digitalcitizensalliance.org/clientuploads/directory/Reports/good-money-gone-bad.pdf (visited May 15, 2018) (reporting that the 596 pirate sites studied earned an annualized amount of $226.7 million in advertising revenue in 2013).

[16] See "WTF is Programmatic Advertising?" Digiday (Feb. 20, 2014), available at https://digiday.com/media/what-is-programmatic-advertising/ (visited May 26, 2018).

[17] See https://tagtoday.net/piracy/ (visited May 15, 2018)

Plainly, piracy, and the harms it causes, are matters of tremendous public interest. As only one example, over the last several years, the FBI has focused on intellectual property crimes, and the government's need to collaborate with business to combat those crimes.[18] As its website explains, "[t]he Bureau has already been collaborating for years with brand owners, copyright holders, and trademark holders because we know the harm that intellectual property theft causes: legitimate businesses lose billions of dollars in revenue and suffer damaged reputations, consumer prices go up, the U.S. and global economies are robbed of jobs and tax revenue, product safety is reduced, and sometimes lives are even put at risk."[19]

This new strategy focuses on, among other things, ensuring that "online marketplaces, payment service providers, and advertisers" do not "inadvertently enable the activities of criminals." Id. Specifically, "[o]nline advertising systems and platforms enable website owners to outsource the process of monetizing their website traffic. Criminals have

---

[18] See "What We Investigate; White Collar Crime; Intellectual Property Theft/Piracy," available at https://www.fbi.gov/investigate/white-collar-crime/piracy-ip-theft (visited May 16, 2018) ("What We Investigate"). See also "Countering The Growing Intellectual Property Theft Threat; Enhancing Ties Between Law Enforcement And Business" (Jan. 22, 2016), available at https://www.fbi.gov/news/stories/countering-the-growing-intellectual-property-theft-threat (visited May 16, 2018) (discussing new strategy to combat intellectual property crimes).

[19] See "What We Investigate," footnote 18, supra.

begun exploiting advertising as an alternative revenue stream, drawing traffic to their sites by offering counterfeit products for sale or pirated digital content for download." Id. Under its new initiative, the FBI "assist[s] these companies with refining their own analytical tools and techniques for uncovering fraud." Id.

But Amici and myriad other advertisers also actively police their advertisement spending to avoid supporting sites engaged in intellectual property theft. DoubleVerify plays a critical role in doing that. It is a Digital Advertising Assurance Provider, one of several companies that provide services enabling brands to prevent placement of their ads on sites they wish to avoid. DAAPs research and analyze millions of websites in order to provide advertisers information that they can use to make informed choices about where their ads should – and should not – appear. This information, for example, helps advertisers prevent their ads from appearing on sites engaged in piracy, or on sites engaged in spreading malware or in other illegal or inappropriate content, such as the display of pornography.

DAAPs are certified by the Trustworthy Accountability Group ("TAG"), an organization created "to help tackle issues facing digital

advertisers, including malware, fraud, piracy, and lack of transparency."[20] TAG describes itself as a joint marketing-media industry program, with five core objectives: (1) fighting Internet piracy; (2) eliminating fraudulent traffic; (3) combatting malware; and (4) promoting brand safety through increased transparency; and (5) creating accountability.[21] TAG was created by the American Association of Advertising Agencies (4A's), Association of National Advertisers (ANA), and Interactive Advertising Bureau (IAB) for the purpose of developing standards and criteria to advance the anti-piracy initiatives of these groups. It describes the problem it set out to solve:

> Until recently, advertisers who wished to keep their advertisements off all or a subset of AREs [Ad Risk Entities] had limited options available to effectuate their intentions. In the last few years, however, a number of entities – here called "Digital Advertising Assurance Providers" or DAAPs – have emerged that, in a variety of ways, can assist advertisers, ad agencies, ad networks, trading platforms, and/or other actors in the ad ecosystem avoid the undesired placement of ads on AREs.[22]

---

[20] See TAG "Anti-Piracy Program FAQ" (TAG FAQ), Q1, available at https://www.tagtoday.net/piracyfaq/ (visited May 16, 2018).

[21] See TAG, "Core Criteria for Effective Digital Advertising Assurance" (TAG Core Criteria) at 02, available at https://cdn2.hubspot.net/hubfs/2848641/TrustworthyAccountabilityGroup_May2017/Docs/Core-criteria_final.pdf?t=1526042985871 (visited May 16, 2018).

[22] See TAG Core Criteria, footnote 21, supra, at 03.

In this and other ways, DoubleVerify and other DAAPs help brands avoid inappropriate sites, while aiding in the fight against piracy by diminishing the ability of those sites to draw in advertising dollars. DAAPs also contribute to the global fight against internet piracy by raising awareness as to which sites fund illegal copyright infringement by selling ad space. DAAPs and other outlets engaged in raising awareness in the internet advertising space would be less willing to contribute to the public discourse if their speech – the findings, analyses, and reports of website content and traffic that they disseminate to the public – were unprotected by the anti-SLAPP statute. The trial court certainly was correct in concluding that DoubleVerify and companies like it serve "a very legitimate function" and "a very valuable public function," and that "we are better for it." R.T. 4:6-13.

Entities like DoubleVerify play a vital role for businesses advertising in today's media environment. Adopting an interpretation of the anti-SLAPP statutes that would remove protection from speech that furthers the strong public interest in transparency in advertising would deprive a large number of speakers of the protection the Legislature intends for them.

VI.

CONCLUSION.

This Court should not disrupt the careful balance adopted by the Legislature when it enacted Section 425.17(c) – a narrowly-defined exception to California's anti-SLAPP statute – by creating a nebulous "speech in a commercial setting" exemption.

For all of the reasons discussed in DoubleVerify's Answering Brief and above, Amici respectfully request that the Court reject FilmOn's arguments, and affirm the Court of Appeal's conclusion that the anti-SLAPP statute protects DoubleVerify's speech here.

Dated: May 29, 2018

DAVIS WRIGHT TREMAINE LLP
KELLI L. SAGER
THOMAS R. BURKE
ROCHELLE L. WILCOX

By Rochelle L. Wilcox RLL
Rochelle L. Wilcox

Attorneys for Amici Curiae
MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE HEARST CORPORATION, TEGNA INC., CALIFORNIA NEWS PUBLISHERS ASSOCIATION and FIRST AMENDMENT COALITION

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), the text of this brief, including footnotes and excluding the caption page, table of contents, table of authorities, the signature blocks and this Certificate, consists of 9,772 words in 13-point Times New Roman type as counted by the Microsoft Word word-processing program used to generate the text.

Dated: May 29, 2018

DAVIS WRIGHT TREMAINE LLP
KELLI L. SAGER
THOMAS R. BURKE
ROCHELLE L. WILCOX

By: Rochelle L. Wilcox IDL
Rochelle L. Wilcox

Attorneys for Amici Curiae
MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE HEARST CORPORATION, TEGNA INC., CALIFORNIA NEWS PUBLISHERS ASSOCIATION and FIRST AMENDMENT COALITION

Proof of Service

I am employed in the City and County of Los Angeles, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 865 South Figueroa Street, Suite 2400, Los Angeles, CA 90017.

I caused to be served the following document:

AMICI CURIAE BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE HEARST CORPORATION, TEGNA INC., CALIFORNIA NEWS PUBLISHERS ASSOCIATION AND FIRST AMENDMENT COALITION IN SUPPORT OF DEFENDANT AND RESPONDENT DOUBLEVERIFY, INC.

on each court and/or counsel on the attached list by the following means:

(FEDERAL EXPRESS) – I am familiar with the practice at my place of business for collection and processing of documents for overnight delivery by Federal Express. Such documents will be deposited with a facility regularly maintained by Federal Express for receipt on the next business day with delivery fees paid or provided for in accordance with ordinary business practices of Federal Express.

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

Executed on May 29, 2018, at Los Angeles, California.

Ellen Duncan

Service List

Federal Express	Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797	**Case No. S244157**
Federal Express	Clerk of the Court Court of Appeal of State of California Second Appellate District, Div. 3 Ronald Reagan State Building 300 South Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	***Court of Appeal*** **Case No. B264074**
Federal Express	Hon. Terry A. Green, Judge Superior Court, County of Los Angeles Stanley Mosk Courthouse, Dept. 014 111 North Hill Street Los Angeles, CA 90012-3014	***Trial Judge*** **LASC Case No. BC561987**
Federal Express	Ryan G. Baker, Esq. Scott M. Malzahn, Esq. Blake D. McCay, Esq. BAKER MARQUART LLP 2029 Century Park East, Suite 1600 Los Angeles, CA 90067	**Attorneys for Plaintiff/ Petitioner** ***FilmOn.com, Inc.***
Federal Express	Lincoln D. Bandlow, Esq. FOX ROTHSCHILD LLP 10250 Constellation Blvd., Suite 900 Los Angeles, CA 90067	**Attorneys for Defendant/ Respondent** ***Doubleverify, Inc.***