

**Case No. S260736**

**IN THE SUPREME COURT OF CALIFORNIA**

Vera Serova,  
*Plaintiff and Respondent Below,*

v.

Sony Music Entertainment; John Branca, as Co-Executor of the  
Estate of Michael J. Jackson; and MJJ Productions, Inc.  
*Defendants and Appellants Below.*

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After A Decision By The Court Of Appeal,  
Second Appellate District, Division 2  
Case No. B280526

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**DEFENDANTS' CONSOLIDATED ANSWER TO  
AMICUS CURIAE BRIEFS**

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## INTRODUCTION

The amicus briefs filed by the California Attorney General (“AG”), Los Angeles City Attorney (“Los Angeles Attorney” or “LA”), Consumer Attorneys of California (“Consumer Attorneys), and UC Berkeley Center for Consumer Law & Economic Justice (“Consumer Law Center”)<sup>1</sup> on behalf of plaintiff Vera Serova (“Serova”) do not adequately refute the key points in MJJ’s appellate briefing:<sup>2</sup>

This is not a run-of-the-mill products labeling case. The speech at issue consists of a music album title, cover art, and the attribution to an artist of three recordings on the album’s back cover and in a video announcing the album’s release (the “Challenged Speech”). *All of it* is either artistic expression itself, or relates to that expression in a manner that takes it outside the constitutionally permissible regulation of commercial speech.

The Court of Appeal thoughtfully analyzed the commercial speech doctrine, including the important factors underlying it, and rightly found that imposing strict liability under California’s consumer protection statutes in this case impermissibly treads on the First Amendment.

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<sup>1</sup> Additional amici joined the Consumer Law Center’s Brief.

<sup>2</sup> Defendants MJJ Productions, Inc. (“MJJP”), the Estate of Michael Jackson (“Estate”), and Sony Music Entertainment (“Sony”) are collectively referred to as “MJJ” herein.

Amici conclude that the distinction between artist attribution on the one hand, and advertising descriptions that *only* seek to influence purchasing decisions on the other, is of no legal consequence. In doing so they ignore substantial constitutional authority to the contrary, and misstate what is commercial speech, and what is not. And like Serova, they do not identify any case where misattributing artistic expression to a particular artist was treated as commercial speech. Amici also misconstrue the standard for verifiability; overlook United States Supreme Court precedent contradicting their argument that courts regulate attributions to art; proffer a parade of horrors arising from situations well outside the facts here; and, finally, offer arguments directly at odds with the anti-SLAPP statute's plain language and purpose.

Perhaps most importantly, it is simply not credible for amici to argue that imposing strict liability here would not chill artistic expression—of course it will. Unlike the food seller where “[n]o law of man or nature” (*Dex Media West, Inc. v. City of Seattle* (9th Cir. 2012) 696 F.3d 952 (*Dex Media*)) prevents them from selling their product without calling it “organic,” music distributors cannot possibly sell music without identifying the artist. The Hobson's Choice discussed in MJJ's Answering Brief is real. MJJ had to choose between not releasing the music, or being strictly liable if a jury disagreed with the results of their diligent efforts to identify the vocalist.

What amici is really proposing is that despite the undeniable chilling effect on First Amendment expression their rule would cause, consumer protection laws are more important. This proposition has been rejected in every context it has been considered, including the very statutes at issue here.

Separately, even if the speech was commercial, Serova’s claims would still fail because they are based on the premise that MJJ is passing off the recordings (copyrightable expression) as Michael Jackson’s when they are not his, a theory that is preempted by the Copyright Act. Amici do not address this jurisdictional defect.

## **LEGAL DISCUSSION**

### **I. THE CHALLENGED SPEECH IS NOT COMMERCIAL.**

Amici erroneously claim that when sold in the marketplace, fully First Amendment-protected artistic expression should be treated identically to any ordinary consumer product entitled to little or no constitutional protection—both subject to strict liability for any misstatements on labels or advertisements. (See AG 38 [arguing “[w]hen the music industry sells an album” this is the same as when “the pharmaceutical industry markets a drug, or the food and beverage industry markets a cereal or soda”]; Consumer Attorneys 13 [“There is simply no difference between a music album and a food product, or any other product, for that matter.”]; LA 14 [consumer protection laws should cover “‘artistic’ matters”].)

But this ignores the fundamental characteristics of speech attributing expressive works to an artist. As discussed below, constitutional case law and the practical realities of distributing artistic expression dictate that statements about the identity of the artist of an artistic work cannot be treated the same as a bottle of juice, a door lock, or other consumer products that in no way implicate First Amendment protections.

**A. Identifying The Artist Of Artistic Expression Is Not Commercial Speech; It Imparts Subjective Meaning To, And Is Therefore A Part Of, The First Amendment Work Itself, And It Is A Practical Necessity For Distribution.**

Contrary to the AG’s contention, attributing a piece of music to a particular musical artist on a product label is not “classical commercial speech.” (AG 33.) Core commercial speech is speech that “does no more than propose a commercial transaction.” (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 66 (*Bolger*), internal quotation and citation omitted.) Outside of this definition of “core” commercial speech, commercial speech can also include pricing and descriptions of the work, but those elements serve to influence a purchaser’s decision. The product label cases the AG cites all involve speech that goes *solely* to influencing a consumer’s purchasing decision: for example a description of the ingredients of a product (e.g. “juice blend”), a description of a physical trait of a product (e.g. a “flushable” wipe), or the manufacturing process for the product (e.g. “authentic Danish-made goods”). (AG 34-35.)

But courts recognize that speech like the Challenged Speech here has a critical function beyond only trying to influence a purchasing decision; it imparts subjective meaning to the art itself. (See *Rogers v. Grimaldi* (2d Cir. 1989) 875 F.2d 994, 998 (*Rogers*) [“Titles, like the artistic works they identify, are of a hybrid nature, combining artistic expression and commercial promotion.”]; *Armstrong v. Eagle Rock Entertainment, Inc.* (E.D.Mich. 2009) 655 F.Supp.2d 779, 787 [DVD cover which includes “artwork” and “information about the contents of the DVD, contains expression protected by the First Amendment”]; *Serova v. Sony Music Entertainment* (2020), 44 Cal.App.5th 103, 130 (*Serova*) [recognizing “[t]he identity of a singer, composer, or artist can be an important component of understanding the art itself”].) Indeed, the Challenged Speech is part and parcel of the artistic expression. (CT 1:119 [FAC ¶¶ 24, 27].)

That artist attribution gives substantive meaning to the art itself is also evident in artists’ use of personas, alter egos, and pseudonyms that can either dissociate the art from the artist, or become a part of the artists’ expression. For example, alter egos can “serve as a mask of protection and separation for an artist from their work, and other times they act as guise under which one can freely and momentarily experiment with another side of oneself.”<sup>3</sup> Lady Gaga is the alter ego of Stefani Joanna Angelina Germanotta,

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<sup>3</sup> (See Mic Anderson, *10 Alter Egos of the Music Industry*, Britannica <<https://www.britannica.com/list/10-alter-egos-of-the-music-industry>>[as of April 25, 2021].)

who is known for her “flamboyant costumes, provocative lyrics and strong vocal talents.”<sup>4</sup> J.K. Rowling, the internationally famous author known for her *Harry Potter* series,<sup>5</sup> wrote a mystery series under a pseudonym, Robert Galbraith, so that she could take her “writing persona as far away as possible from [herself]” and to, among other things, “receive totally unvarnished feedback.”<sup>6</sup> These examples highlight the natural and undeniable nexus between the identity of the artist and the art itself, and how interpretation of the art can be affected by the mere identity of the artist.

Under the amici’s analysis, artists’ use of pseudonyms and alter egos can be actionable as false advertising for the misattribution alone because they do not accurately portray the true identity of the artists creating the artistic works. Courts, however, have not adhered to such a rigid application of the commercial speech doctrine and this Court should not do so here.

In *Rogers v. Grimaldi*—a case the AG cites without the court’s full holding—the Second Circuit explained that a title for an artistic work is *both* “expression” and a “means of marketing” the work to the public. (*Rogers, supra*, 875 F.2d at pp. 997-998.) “The artistic and commercial elements of

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<sup>4</sup> (See Michael Levy, *Lady Gaga, American singer-songwriter* (Mar. 25, 2021) Britannica <<https://www.britannica.com/biography/Lady-Gaga>>[as of April 25, 2021].)

<sup>5</sup> (See About J.K. Rowling <<https://www.jkrowling.com/about/>>[as of April 25, 2021].)

<sup>6</sup> (See About Robert Galbraith <<https://robert-galbraith.com/about/>>[as of April 25, 2021].)

titles are inextricably intertwined,” and a title “can enrich a reader’s or a viewer’s understanding of a work.” (*Id.* at p. 998.)<sup>7</sup> Indeed, “[t]hough consumers frequently look to the title of a work to determine what it is about, they do not regard titles of artistic works in the same way as the names of ordinary commercial products.” (*Id.* at p. 1000.) Consumers “have an interest in not being misled and they also have an interest in enjoying the results of the author’s freedom of expression.” (*Id.* at p. 998.) For all these reasons, “First Amendment values” must be considered, and “the expressive element of titles *requires more protection than the labeling of ordinary commercial products.*” (*Id.* at pp. 998, italics added; *Mattel, Inc. v. MCA Records, Inc.* (9th Cir. 2002) 296 F.3d 894, 901-902 (*Mattel*) [title of a movie is “not a brand of shoe” and “deserved to be treated differently”].) These cases rightly reject the notion that labels for artistic works should be treated the same as other consumer products.

The Challenged Speech also has a separate purpose beyond simply trying to influence purchasing decisions, which takes it outside the purview of commercial speech. Free websites and streaming services that offer music

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<sup>7</sup> The amici’s suggestion that the attribution in this case cannot carry meaning because it was false, conflates the issue of falsity with the characterization of commercial speech. A court must first determine whether speech is commercial based on, among other things, considering the content of the speech, i.e. the type of speech at issue. Falsity is considered only *after* the speech has been deemed commercial or not, because commercial and noncommercial speech is subjected to different standards in evaluating falsity. (See *infra* Part I.C.)



display music by the name of the artist, the title of the song, the title of the album, and often with an image of the album cover.<sup>8</sup> Similarly, music charts that monitor and report the most popular music in the country rank songs and albums by various metrics such as genre, naturally with descriptions of the artists, titles of songs and albums, and images of the album covers.<sup>9</sup> And to share music tastes and preferences with others, it is common for individuals and entities to create playlists, which identify artists and songs and/or album titles.<sup>10</sup> These examples illustrate that the titles of albums, album artwork, and the identity of the artists are integral to how individuals experience, understand, consume, sort, organize, and share musical expression. Indeed, using artist attributions is a practical necessity to distributing musical recordings which means that any commercial aspects of

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<sup>8</sup> iHeart and Pandora both offer free versions of their services, providing access to music from popular artists and bands. (iHeart Radio <<https://www.iheart.com/>> [as of April 25, 2021]; Pandora <https://www.pandora.com/>[as of April 25, 2021].) Other free music websites provide similar information. (Tribe of Noise <<https://prosearch.tribeofnoise.com/search/index>>[as of April 25, 2021].)

<sup>9</sup> (See e.g., Billboard <<https://www.billboard.com/charts/hot-100>>[as of April 25, 2021]; Rolling Stone, *Top 100 Songs* <<https://www.rollingstone.com/charts/songs/>>[as of April 25, 2021].)

<sup>10</sup> (See e.g., Playlists.net <<https://playlists.net/>>[as of April 25, 2021]; NPR Music Staff, *NPR Music Playlists, Press Pause and Hit Play: The Best New Songs You Missed In 2021* (Apr. 20, 2021) NPR <<https://www.npr.org/2021/01/21/958840884/press-pause-and-hit-play-the-best-new-songs-you-missed-in-2021>>[as of April 25, 2021]; Heran Mamo, *See Which Artists It Onto Barack Obama's 2020 Summer Playlist* (Aug. 17, 2021) Billboard <<https://www.billboard.com/articles/columns/pop/9435742/barack-obama-2020-summer-playlist>>[as of April 25, 2021].)

the speech is “inextricably intertwined” with the noncommercial artistic expression and therefore is also fully protected. (*Dex Media, supra*, 696 F.3d 952, 958; MJJ 56-60.)

In arguing the Challenged Speech is commercial, the AG cites to Lanham Act cases as examples of courts treating a statement linking an artist to an artistic work as commercial speech. (AG 37-38, fns. 15-16.) As discussed below, the United States Supreme Court more recently held that the Lanham Act does not permit claims for the misattribution of an author or source of an artistic work. (*See infra* Part I.F.) But more fundamentally, the cases that the AG cites do not contain any analysis on distinguishing between commercial and noncommercial speech. The nature of the speech was not disputed by the parties. (See, e.g., *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.* (2d Cir. 1987) 818 F.2d 266, 271 [treating album cover as commercial speech without analysis].) By contrast, in cases where commercial speech *was* a central dispute, courts have found that a title of an artistic work was *not* commercial speech. (See e.g., *Mattel, supra*, 296 F.3d at pp. 906-907 [finding song title of “Barbie Girl” is not purely commercial speech, and is therefore fully protected” by the First Amendment].)

The Consumer Law Center’s reliance on *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220 (*Keimer*) and *Rezec v. Sony Pictures* (2004) 116 Cal.App.4th 135 (*Rezec*) (Consumer Law Center at p. 18) is equally unavailing. In *Keimer*, advertising materials for a non-fiction book were “of a core commercial nature,” because they claimed the authors had achieved

specific returns on their investments. (*Keimer, supra*, 75 Cal.App.4th at pp. 1223-1224, 1229.) The statement on the “covers were designed with a single purpose in mind, to sell books,” and defendant could have sold the book without making the statement. (*Id.* at p. 1229.) And *Rezec* involved advertisements with fake reviews of motion pictures where the challenged statements “did not reflect any character or portion of the films.” (*Rezec, supra*, 116 Cal. App. 4th at p. 142.) The sole purpose of the statements was commercial, i.e., to influence people to see the movie. The movie could have been promoted without the fake reviews and the meaning of the movie would remain fully intact. In contrast to those cases, the Challenged Speech is attributing expression to a speaker, and so it relates directly and imparts meaning to, and indeed is inextricably intertwined with, the art itself.

Thus, contrary to the amici’s arguments, descriptions of artistic works on labels and promotions that directly relate to the artistic expression are functionally different from other consumer product labels in a manner that removes them from the ambit of commercial speech.

**B. Courts Have Refused To Apply Strict Liability To Descriptions And Promotions Of Artistic Work.**

Although amici contend that strict liability applies to descriptions of artistic works (AG 46-48), there is a dearth of case law applying strict liability to statements about artistic expression—and for good reason. In *Winter v. G.P. Putnam’s Sons*, plaintiffs became ill after eating mushrooms in reliance on an encyclopedia published by defendant and sought imposition of

strict liability for the alleged misinformation in the book and also for false representations describing the book. (See *Winter v. G.P. Putnam's Sons* (9th Cir. 1991) 938 F.2d 1033, 1033-1037, 1036 fn.5 (*Winter*).) In affirming summary judgment for the defendant, the Ninth Circuit explained that “[t]he threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories.” (*Id.* at 1035.) Conversely, laws that do not apply strict liability, i.e. the laws of copyright, libel, misrepresentation, negligence, and mistake, “are aimed at the *delicate issues that arise with respect to intangibles such as ideas and expression.*” (*Id.* at p. 1034, italics added.) Consequently, the Ninth Circuit refused to apply strict liability to plaintiff’s claim based on erroneous information contained in the book, as well as to alleged misrepresentations “concerning the character or quality” of the book because “the same logic [applied].” (*Id.* at p. 1036 fn.5.) In so holding, the Ninth Circuit emphasized, that “*no court*” to its knowledge has imposed strict liability to ideas and expression. (*Id.* at p. 1036, italics added.)

Similarly, when commercial speech is adjunct to noncommercial speech, i.e. “promotes only the protected publication,” courts have required a showing of scienter to be actionable, i.e., that the publishers knew their statements were false or published them in reckless disregard for their truth. (*Cher v. Forum Internat., Ltd.* (9th Cir. 1982) 692 F.2d 634, 637-639 [First Amendment protections for claims, including UCL claim, extended to

headlines and promotions that are “merely an adjunct” of protected speech “so long as the headlines and promotional devices were true *or were not published with knowledge that they were false or in reckless disregard for their truth,*” italics added]; *William O’Neil & Co., Inc. v. Validea.com Inc.* (C.D.Cal. 2002) 202 F.Supp.2d 1113, 1116, 1119-1120 [evaluating UCL claim and right of publicity claim and holding that advertisements for a book were “protected to the same extent as the book itself”; to be actionable plaintiff had to allege “the requisite scienter, that is, that [publisher] knowingly or recklessly published false statements”].)

The Court of Appeal’s opinion is entirely consistent with these authorities, and well situated among numerous cases correctly recognizing that a work of artistic expression is not the same as a defective tire or a pork sausage.

**C. Because The Challenged Speech Is Not Core Commercial Speech, The Court of Appeal Correctly Evaluated Other Factors And Determined That It Was Not Commercial.**

Amici also misapply the standard for identifying commercial speech when it falls outside the realm of core commercial speech. Amici suggest that because the parties stipulated for purposes of the anti-SLAPP motion that the attribution to Jackson was false, that this precludes finding that the speech was noncommercial. (Consumer Attorneys 5-6; Consumer Law Center 7-8.) But the United States Supreme Court has squarely held that truth or falsity is not the test for noncommercial speech:

Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood. . . . [E]ven when the utterance is false, the great principles of the Constitution which secure freedom of expression... preclude attaching adverse consequences to any except the knowing or reckless falsehood.

(*United States v. Alvarez* (2012) 567 U.S. 709, 719, internal quotation and citation omitted.) Falsity alone may be dispositive of liability for commercial speech, because commercial speech may be regulated based on strict liability. (*Kasky v. Nike* (2002) 27 Cal.4th 939, 953-954, as modified (May 22, 2002) (*Kasky*)). That is not the case for noncommercial speech.

Under the Supreme Court and this Court's jurisprudence, because commercial and noncommercial speech are afforded different levels of protection, the court "*must first* determine the proper classification" of the speech at issue. (*Bolger, supra*, at p. 65, italics added.) Specifically, whether speech is commercial is typically a question of law for the court to determine at the outset. (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 343-350 (*Bernardo*) [evaluating whether plaintiff showed a reasonable probability of prevailing on the merits, by *first* determining whether the speech at issue was commercial, and then assessing the truth of the speech]; *Charles v. City of Los Angeles* (9th Cir. 2012) 697 F.3d 1146, 1157 [noting that whether speech is commercial is a question of constitutional law].) Amici turn the analysis on its head.

The parties' stipulation for the purposes of the anti-SLAPP motion that attributing the Cascio Recordings to Jackson was false, is not determinative of whether the speech is commercial, indeed it is irrelevant. Further, because artistic work is commonly sold for profit (*Joseph Burtsyn, Inc. v. Wilson* (1952) 343 U.S. 495, 502), and "commercial motivation does not transform noncommercial speech into commercial speech," (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1048, fn. 3), the sale of *Michael* to the public is also not determinative. Rather, the critical issue in this case is whether the speech should be deemed commercial "by its content." (*Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490, 504, fn. 11.)

*Kasky* and United States Supreme Court precedent establish that in evaluating the speech's content, courts must consider the underlying rationale for regulating speech: whether the speech is verifiable, whether regulation is likely to chill the speech, and whether the regulation is consistent with traditional regulation of commercial transactions. (*Kasky, supra*, 27 Cal.4th at pp. 962-964; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 772, fn. 24 (*Virginia State Bd. of Pharmacy*); *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557, 564, fn. 6 (*Central Hudson*).)

The Court of Appeal correctly found the Challenged Speech's content "is critically different from the type of speech that may be regulated as purely commercial speech." (*Serova, supra*, 44 Cal.App.5th at p. 126.) In addition to imparting subjective meaning to artistic work fully protected by the First

Amendment, it was not readily verifiable by MJJ, imposing strict liability would chill artistic expression, and it is not consistent with traditional government authority to regulate commercial transactions.

**D. Verifiability Is One Justification For Distinguishing Commercial Speech And It Is Absent Here.**

To be clear, and to the extent amici suggest otherwise, MJJ does not contend that if an attribute of a product is not verifiable by the seller, it is not commercial speech. Rather, verifiability is an important factor in undertaking the analysis because it is one of the justifications for regulating commercial speech. (*Kasky, supra*, 27 Cal.4th at pp. 962.) With respect to the analysis itself, amici misunderstand the import of what it means to be verifiable. As Justice Stevens explained:

Most of the time, if a seller is representing a fact or making a prediction about his product, the seller will know whether his statements are false or misleading and he will be able to correct them. On the other hand, the purveyor of political speech is more often (though concededly not always) an observer who is in a poor position to verify its truth. The paradigm example of this latter phenomenon is, of course, the journalist who must rely on confidential sources for his information.

(*Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 495, fn.4 (*Rubin*), J. Stevens, concurring.)

Verifiability depends in part on a statement's objective nature. (*Friedman v. Rogers* (1979) 440 U.S. 1, 10 ["Because it relates to a particular product or service, commercial speech *is* more objective, hence more verifiable, than other varieties of speech," italics added.] But verifiability



also depends on the *access* to that objective information. “[O]rdinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.” (*Original Cosms. Prod., Inc. v. Strachan* (S.D.N.Y. 1978) 459 F.Supp. 496, 501, *aff’d* (2d Cir. 1979) 603 F.2d 214; *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia* (3d Cir. 1990) 898 F.2d 914, 934 [commercial speakers “are uniquely situated to evaluate the truthfulness of their speech”].)

Amici misconstrue the standard for verifiability. The AG argues that a jury should determine the true performer of the Cascio Recordings because it is “just as ‘verifiable’ as numerous other factual contentions routinely examined in legal actions.” (AG 50.) Assuming a jury could make this determination, whether a statement is “more readily verifiable *by its speaker*” is a question courts can answer as a threshold issue on the record before them. (See e.g. *Kasky, supra*, 27 Cal.4th at pp. 947, 963, 969, italics added [determining “Nike was in a position to readily verify the truth of any factual assertions it made on [its subcontractors’ working conditions]”]; *Keimer, supra*, 75 Cal.App.4th at pp. 1223, 1225 [finding statements on book covers were “verifiably false factual statements”; publisher could have verified the accuracy because the publisher had previously issued a disclaimer explaining how the rate was computed]; *Mut. Pharm. Co. v. Ivax Pharms., Inc.* (C.D.Cal. 2006) 459 F.Supp.2d 925, 939 [noting that a false advertising claim based on a seller’s statement that its product was FDA approved “was a fact that was

readily verifiable”; the speaker had either received a letter of approval from the FDA or it had not].)

In this case, through Serova’s own pleading, the record established that MJJ was *not* in a position to verify who sang the vocals. The Cascio Defendants were in sole and exclusive possession of that knowledge, and hid it from MJJ. (CT 1:117 [FAC ¶ 18].) Those established facts distinguish this case from the facts that supported a finding of commercial speech in *Kasky* and *Keimer*. In *Kasky*, Nike could verify its working conditions (*Kasky, supra*, 27 Cal.4th at p. 947, 963) and the *Keimer* defendants could verify the publicized investment returns (*Keimer, supra*, 75 Cal.App.4th at pp. 1223, 1225.) In contrast, the Challenged Speech was not verifiable to MJJ.

Amici also incorrectly treat verifiability as synonymous with personal knowledge.<sup>11</sup> The issue is not that MJJ “lacked personal knowledge of the inaccuracy” (AG 17), it is that MJJ could not do anything more than it did to verify the identity of the artist. Amici’s failure to distinguish between personal knowledge and verifiability leads them to believe that considering verifiability would reward sellers who avoid provenance investigations. (See AG 17.) But that is not the case. For sellers who *could* verify statements with reasonable investigations but *chose not to*, the statement is still *verifiable* despite the lack of due diligence. In other words, verifiable means

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<sup>11</sup> Although the Court of Appeal used the phrase personal knowledge, it is clear from the context of the discussion that it was evaluating verifiability. (*Serova, supra*, 44 Cal.App.5th at pp. 126-127.)

that the seller had readily available means to determine whether a statement was true or false. Whether a seller fulfills the obligation to conduct the due diligence is a separate issue, and turning a blind eye may amount to recklessness, which may be actionable even for noncommercial speech. (See *Alvarez, supra*, 132 S. Ct. at p. 2545.)<sup>12</sup> Strict liability need not apply to protect the consumer in these situations.

Last, amici erroneously suggest that verifiability would supplant the core commercial speech analysis. The AG points to substantiating advertising claims (when a seller makes an objective claim about its product) and competitive advertising statements (when a seller makes claims about their competitors' production methods or process) as examples of where requiring personal knowledge would be problematic. As an initial matter, as previously noted, personal knowledge is not the same as verifiability and a deliberate lack of personal knowledge is not a basis to avoid liability. (See e.g. *MillerCoors, LLC v. Anheuser-Busch Cos.* (W.D. Wis. 2019) 385 F.Supp.3d 730, 746, 751 [finding that whether competitor's products actually contain corn syrup is a factual representation, and rejected defendant's argument that it "lack[ed] information and knowledge" on this fact].) More importantly, these types of advertising statements are core commercial

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<sup>12</sup> The AG's argument that there is no safe harbor for due diligence under a strict liability regime is premised on the characterization of the speech as commercial speech. (AG 46-49.) Verifiability, however, is one factor in evaluating whether the speech is commercial in the first place.

speech: “representations of substantiation are material to consumers”<sup>13</sup> and a statement about a competitor’s product “is a source of important information to consumers and assists them in making rational purchase decisions.”<sup>14</sup> In cases outside the core commercial speech context, like this one, whether to treat speech as commercial, or afford it broader protection as noncommercial, requires examining the *reasons* for the distinction, and verifiability is a central consideration.

**E. The Hardiness of Speech Is Another Justification For Distinguishing Commercial Speech And It is Also Absent.**

Commercial speech receives only minimal First Amendment protection because it is deemed hardy enough to withstand being chilled by regulation. (*Kasky, supra*, 27 Cal.4th at p. 963 [regulation is “unlikely to deter” commercial speech]; *Central Hudson, supra*, 447 U.S. at p. 564, fn. 6 [commercial speech “is a hardy breed of expression”].) According to amici, *all erroneous attributions of an artistic work to an artist*, should be treated the same as any other false statement about a consumer product, subject to strict liability. (AG 38, 57-58; Consumer Attorneys 13; LA 14.)

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<sup>13</sup> (FTC Policy Statement Regarding Advertising Substantiation, Federal Trade Commission (Nov. 23, 1984) <<https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation>>[as of April 26, 2021].)

<sup>14</sup> (*Sony Computer Entertainment America, Inc. v. Bleem, LLC* (9th Cir. 2000) 214 F.3d 1022, 1027, quoting 16 C.F.R. § 14.15(c) (1980)), amended on denial of reh’g (July 10, 2000); *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 147 (*FilmOn*) [comparative advertising is a subset of commercial speech].)

In the arts and entertainment industry, there are myriad circumstances under which an attribution may be made erroneously in good faith, resulting in a false attribution (albeit an innocent one). For example, when multiple artists contribute to an artistic work and it is uncertain who should be credited; when, as here, the artist or creator is deceased and the authenticity of the art is in question; or when creators accuse each other of copying or plagiarism and a dispute ensues, and is later resolved, on who originated the work.<sup>15</sup> In each of these situations, despite the different underlying facts, the end result is that the individual identified as the artist when the work is proffered to the public may be incorrect. The amici fail to recognize the inherent complexity and difficulty in determining attributions for artistic works, which makes the speech fragile and easily subject to being chilled in the face of strict liability.

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<sup>15</sup> (See e.g., *Kronemyer v. Internet Movie Database, Inc.* (2007) 150 Cal.App.4th 941, 944 [noting there are “frequent disputes among industry professionals and studios regarding who should and should not be included in the [filmography] credits”]; *Serova, supra*, 44 Cal.App.5th at p. 130, fn. 17 [noting uncertainty on whether works were created by deceased artists]; Rebecca Tushnet, *Naming Rights: Attribution and Law* (2007) 2007 Utah L. Rev. 789, 805–806 [determining attribution for art is, at times, “prohibitively difficult”; for example, considering contribution levels by figures “who shaped the works” such as editors and research assistants, or when there are multiple “authors whose contribution levels may vary”]; *id.* at p. 805 [“What should 2 Live Crew do to indicate that certain portions of their song ‘Pretty Woman’ were taken from Roy Orbison’s ‘Oh, Pretty Woman,’ while others were not?”].)

The AG's suggestion that more false advertising scrutiny would provide appropriate incentives "to be more transparent that an attribution is based on research or expert opinion" is misguided. (AG 58.) In this case, MJJ did exactly that, prior to the release of the album, MJJ publicly announced the diligent investigations that it undertook to authenticate the Cascio Recordings, which included using two forensic musicologists. (See MJJ 17-19.) But if attributions are subject to strict liability, despite using the best that research or expert opinion has to offer, if the publisher gets it wrong, the false attribution is treated the same as an erroneous attribution that is made carelessly without any investigation, research, or examination whatsoever.

The AG also argues that treating attribution to artistic works as commercial speech subject to strict liability will not chill speech. (AG 52-56.) This is just not credible. After expending significant time and expense on due diligence MJJ had to choose between (a) defending itself in a lawsuit and facing strict liability if a jury disagreed with its belief that Michael Jackson performed the vocals, or (b) withholding the music from the public. Being pushed to withhold First Amendment protected artistic expression out of fear of legal liability *is the very definition of an impermissible chilling effect*.

In arguing that there is no fear of chilling speech, the AG also ignores the fact that when it comes to art, there are circumstances where attributions are intentionally not aligned with the true identity of the artists, as is the case when artists use alter egos, personas, or pseudonyms. (See *infra* Part I.A.) Imposition of strict liability for all false attributions would chill, or more

likely stop entirely, these long-established artistic practices. The AG ignores these unique traits of artistic expression.

Moreover, the amici fail to recognize that the allocation of risks is simply different when it comes to intangible expression versus tangible products. As one court explained, in the realm of tangible products, the law imposes strict liability because, as a policy matter, the risk of harm should be borne by the manufacturers. (*Winter, supra*, 938 F.2d at pp. 1034-1035, citation omitted.) But the “threat of liability without fault . . . could seriously inhibit those who wish to share thoughts and theories.” (*Id.* at p. 1035 [refusing to impose strict liability to statements contained in a book, and describing the book].)<sup>16</sup> The “high priority” society places “on the unfettered exchange of ideas,” means that the risk of chilling expression is too great. (*Ibid.*) Thus, the risk of chilling the distribution of artistic work, like the unfettered exchange of ideas, is a critical societal concern in a way that the threat of chilling non-artistic products is not.

Last, the AG’s argument that MJJ should have included a disclaimer to avoid liability fares no better. According to the AG, false advertising statutes may require “a seller to say more, or do more, in its marketing materials,” but this assumes the critical issue in this case (AG 55-57)—namely, that the Challenged Speech is commercial and is subject to the consumer statutes in

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<sup>16</sup> In a constitutional analysis, there is no difference between the right to freely exchange ideas discussed in *Winter* and the right to freedom of artistic expression.

the first place. As discussed herein, it is unprecedented for such attributional statements to be treated as commercial speech. When it comes to noncommercial speech, requiring MJJ to append a disclaimer to its fully protected First Amendment product, does not pass constitutional muster. (See *Harper & Row Publishers, Inc. v. Nation Enterprises* (1985) 471 U.S. 539, 559 [First Amendment’s protection includes the “concomitant freedom not to speak”; *Pacific Gas & Elec. Co. v. Pub. Utilities Comm’n of California* (1986) 475 U.S. 1, 11 [free speech “inherently involves choices of what to say and what to leave unsaid”].) Forcing MJJ to express a view contrary to the one it held based on its diligence is not constitutionally permissible.

**F. Although Lanham Act Cases Are Examples of Traditional Government Regulation of Commercial Speech, The Lanham Act Does Not Permit Claims Based On The Alleged Misattribution Of The Source Or Author Of An Artistic Work.**

Under *Kasky*, another factor in the commercial speech analysis is whether treating the speech as commercial—i.e., subjecting the speaker to strict liability for falsity—is “consistent with traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices.” (*Kasky, supra*, 27 Cal.4th at p. 964.) As discussed next, treating the Challenged Speech as commercial speech would be a marked and troublesome departure from traditional regulation of commercial transactions.



To substantiate its claim that there is “no shortage” of cases “where a statement linking an artist to an artistic work was treated as commercial speech,” the AG relies on a handful of Lanham Act cases. (AG 37.) As noted above, however, the cases cited by the AG do not contain any analysis of or even address the commercial speech inquiry (see *infra* Part I.A). And while the Lanham Act cases are relevant to the commercial speech inquiry as an example of traditional government authority to regulate commercial transactions (*Kasky, supra*, 27 Cal.4th at p. 964), the AG wrongly states that the Lanham Act regulates the alleged misattribution of artistic works.

In *Dastar Corp. v. Twentieth Century Fox Film Corp.*, the United States Supreme Court held that a false designation of authorship claim under section 43(a) of the Lanham Act, can only refer to a designation of the producer of the physical product, rather than attribution to the expressive content contained therein. (*Dastar Corp. v. Twentieth Century Fox Film Corp.* (2003) 539 U.S. 23 (*Dastar*). The Court explained that when it comes to a “communicative product,” such as a book or a video, the consumer is not only interested in the identity of the producer of the physical product, but is primarily interested in the identity of “the creator of the story it conveys (the author).” (*Id.* at p. 33.) The Court found, however, that the phrase “origin of goods” in the Lanham Act, refers only to “the producer of the *tangible goods* that are offered for sale, and *not to the author of any idea, concept, or communication embodied in those goods.*” (*Id.* at p. 37, italics added.) The Court refused to read the word “origin” to cover authors of the expressive

content, because that would cause the Lanham Act “to conflict with the law of copyright.” (*Id.* at p. 33.)<sup>17</sup>

Courts have consistently followed *Dastar* to preclude Lanham Act claims that are based on the attribution or authorship of artistic works. In other words, misattribution of authorship has *not* been traditionally regulated as a commercial transaction.<sup>18</sup> For example, in *Antidote Intern. Films, Inc. v. Bloomsbury Pub., PLC* (S.D.N.Y. 2006) 467 F.Supp.2d 394 (*Antidote Films*), a film production company sued the publisher and author of a novel under the Lanham Act for false designation of origin. (*Id.* at pp. 397-398.) The novel was about a 12-year old male prostitute and was advertised as a semi-autobiographical novel. (*Id.* at pp. 396-97.) Plaintiff purchased the film rights because of the novel’s “authenticity,” but sued when it was revealed that the author’s true identity was a woman. (*Id.* at pp. 397-398.)

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<sup>17</sup> Although *Dastar* involved a work in the public domain, “district court cases following *Dastar* have expressly rejected the argument that *Dastar* does not apply where, as here, the work in issue is copyrighted.” (*Contractual Obligation Prods., LLC v. AMC Networks, Inc.* (S.D.N.Y. 2008) 546 F.Supp.2d 120, 130.)

<sup>18</sup> (See *Friedman v. Zimmer* (C.D.Cal., July 10, 2015, Case No. CV 15-502 GHK (Ex)) 2015 WL 6164787 (*Friedman*) [plaintiff’s Lanham Act claim that a movie’s music was falsely advertised as “by Hans Zimmer” when it should have stated “by Richard Freidman” was precluded under *Dastar*]; *Hunter v. Tarantino* (C.D.Cal., July 15, 2010, No. CV1003387SJOPJWX) 2010 WL 11579019, at \*6 [plaintiff’s claim alleging false designation of “authorship of . . . character and plot elements to Tarantino” was precluded under *Dastar*]; *Personal Keepsakes, Inc. v. Personalizationmall.com, Inc.* (N.D.Ill., Feb. 8, 2012, No. 11 C 5177) 2012 WL 414803 [district courts have held that under *Dastar*, “false statements in advertising as to authorship are not viable”].

The district court dismissed the Lanham Act claims because under *Dastar*, the “origin” could only mean the “producer of the physical books,” which was undisputedly the publisher. (*Id.* at pp. 397-398.) Plaintiff argued that *Dastar* applied only when a plaintiff is “attempting to vindicate a copyright claim.” (*Id.* at p. 398.) The district court disagreed, explaining that *Dastar* holds “that copyright law covers [the origin of] ‘communicative products’ . . . regardless of whether a viable copyright claim exists in a given case.” (*Ibid.*)

The district court also rejected plaintiff’s claims based on alleged misrepresentations of the affiliation, characteristics, and qualities of the novel. (*Id.* at pp. 398-399.) The district court held that *Dastar*’s holding “necessarily applies with equal force” to any “claims that sound in false authorship,” such as recasting authorship as an affiliation of a good, or characterizing authorship as a characteristic or quality of a work. (*Id.* at pp. 399-400.)<sup>19</sup> Other courts have consistently held the same. (See *Friedman*, 2015 WL 6164787, at p. \*4 [“characteristics” of a good “cannot be read to refer to authorship” under *Dastar*], quoting *Antidote Films*, *supra*, 467 F.Supp.2d at p. 400; *Focal Point Films, LLC v. Sandhu* (N.D.Cal. Dec. 20, 2019, No. 19-

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<sup>19</sup> The district court, however, held that plaintiff adequately pleaded fraud because it alleged that the publisher knew the true identity of the author and had actively publicized the author was a young man, even though it knew that it was not true. (*Antidote Films*, *supra*, 467 F.Supp.2d at pp. 400-403.)

CV-02898-JCS) 2019 WL 7020209) at \*6 [*Dastar* bars claims based on “misrepresentations regarding authorship”].)

And likewise courts have rejected California UCL claims based on misattribution of authorship (the type of claim Serova alleges here) because “the same standard applies” under *Dastar*. (See *TV One LLC v. BET Networks* (C.D.Cal., Apr. 2, 2012, No. CV 11-08983 MMM (EX)) WL 13012674, at \*7-9 [CA UCL claim based on the same theory as *Dastar* claim is preempted]; accord *Abarca Health, LLC v. PharmPix Corp.* (D.P.R. 2012) 915 F.Supp.2d 210, 221 [“post-*Dastar* [courts] uniformly look past the plaintiff’s nomenclature and test whether the ‘characteristic’ or ‘quality’ that is allegedly misrepresented is simply the product’s creative authorship”].) Indeed, because “claims of unfair competition and false advertising under [the CLRA and UCL] are substantially congruent to claims made under the Lanham Act” (*In re NJOY, Inc. Consumer Class Action Litig.* (C.D.Cal. May 27, 2015, No. CV1400428MMMJEMX) 2015 WL 12732461, at \*9, fn.78), *Dastar* provides yet another reason why Serova’s claim for misattribution of the Cascio Recordings should not be actionable against MJJ.<sup>20</sup>

The cases that the AG cites were decided before *Dastar*, such that they are no longer good law on permitting claims for misattribution of authorship. (See AG at pp. 37-38 [listing cases pre-*Dastar*, i.e. prior to 2003]; *Williams v.*

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<sup>20</sup> This same reasoning underlines MJJ’s argument that Serova’s claims are preempted by the Copyright Act (MJJ 60-67), which amici do not address.

*UMG Recordings, Inc.* (C.D.Cal. 2003) 281 F.Supp.2d 1177, 1181-1183 [noting that pre-*Dastar*, *Smith v. Montoro* (9th Cir. 1981) 648 F.2d 602 (one of the cases the AG relies on here), held that the omission of proper credit is actionable under the Lanham Act; however, *Dastar* barred plaintiff’s Lanham Act claim because it “is based on the misattribution of credits for “story/screenplay”].)

The permitted types of Lanham Act claims based on titles and cover art that have been traditionally regulated as consumer transactions are markedly different than the claims here. Under the Lanham Act, a plaintiff can bring a claim based on the assertion that defendant’s advertising created the false impression that *plaintiff* endorsed or was affiliated with an artistic work. (See e.g., *Toho Co., Ltd. V. William Morrow and Co., Inc.* (C.D.Cal. 1998) 33 F.Supp.2d 1206, 1208-1218 [holding that plaintiff, owner of the Godzilla character and marks, showed a likelihood that consumers would be misled that plaintiff sponsored defendant’s book entitled “Godzilla!” which made unauthorized use of plaintiff’s character and marks]; *Benson v. Paul Winley Record Sales Corp.* (S.D.N.Y. 1978) 452 F.Supp. 516, 518 [defendant’s “prominent use of [plaintiff] Benson’s name and picture on the album and in the advertisements create[d] the false impression that Benson was responsible for the contents of the album”].) But Serova does not claim that MJJ took any action to falsely represent she herself endorsed or was affiliated with *Michael*.

As these lines of cases demonstrate, traditional government authority to regulate commercial transactions does not include claims like Serova's here. Instead, they squarely affirm the Court of Appeal's conclusion that regulating attribution to art is unprecedented, which in turn affirms that the attribution should *not* be treated as commercial speech.

**G. The Parade Of Horribles Presented By Amici Is Inapplicable.**

By sweepingly trying to apply its cited authorities to advertisement statements on any and all consumer products, the amici point to the regulation of consumer products that are entirely different from the music at issue here. (AG 33-34; LA 14-22; Consumer Attorneys 12-15.) For example, the Los Angeles Attorney focuses on COVID-19 frauds such as fake test kits, disinfectants, and cures. (LA 15.) But as the Los Angeles Attorney acknowledges, the Food and Drug Administration tightly regulates food and drug products and the Federal Environmental Protection Agency and the California Department of Pesticide regulate disinfectant products. (*Id.* at pp. 16-17.) These regulations are in place for good reason, to safeguard public health and to avoid consumer harm. Those regulations, however, don't apply to artistic works, which means they are not at issue in this appeal, and their application cannot be impacted by the Court of Appeal's opinion.

Nor is it a valid concern that sellers of traditional consumer products will avail themselves of First Amendment protection by mischaracterizing their products as "art." The LA Attorney, for example, claims that under the

Court of Appeal’s decision, a seller could claim that the “recipe” for a new, false coronavirus cure “reflects *core artistic speech expression* and they are selling their product based on an unsupported ‘opinion’ of the efficacy of their new untested compounds for the ‘cure or treatment’ of coronavirus as well as other diseases.” (LA 16-17, italics added; see also Consumer Attorneys 12-14 [claiming Jimmy Dean’s creation of a pork sausage could be art].)

Here again amici proffer a concern that is not viable. It is well settled that listing ingredients of a tangible product constitutes commercial speech. (See *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 43 [holding that “[defendant’s] product labels and Web site listing of the ingredients of its products are commercial speech”]; *Rubin, supra*, 514 U.S. at p. 481 [“the information on beer labels constitutes commercial speech”].) And it is equally well settled that a recipe does not constitute artistic expression. A recipe that merely provides the “identification of ingredients” is a “statement of facts,” there “is no expressive element.” (*Publications Int’l, Ltd. v. Meredith Corp.* (7th Cir. 1996) 88 F.3d 473, 480.) For example, “the author who wrote down the ingredients for ‘Curried Turkey and Peanut Salad’ was not giving literary expression to his individual creative labors.” (*Ibid.*) By contrast, there is no debate that music is core artistic expression.

Finally, even for artistic works, it is not the case that sellers will have *carte blanche* to make representations regarding artistic works. Common law fraud remains a “traditional” exception to content-based restrictions of non-commercial speech (*New York v. Ferber* (1982) 458 U.S. 747), and *Serova*

brought a fraud claim against the Cascio parties, who she alleges *knew* the recordings were not Michael Jackson. (CT 1:151-1:173). This traditional common law remedy should be sufficient to end the so-called parade of horrors.

## **II. THE ANTI-SLAPP STATUTE APPLIES TO SEROVA’S CLAIMS, BECAUSE THEY ARISE FROM MJJ’S CONDUCT IN FURTHERANCE OF ITS RIGHT TO FREE SPEECH.**

MJJ’s briefing demonstrated that the Court of Appeal correctly held that the anti-SLAPP statute applies to Serova’s claims. (MJJ 25-34.) The Consumer Attorneys and the Consumer Law Center contend that (1) corporate defendants should not be allowed to file anti-SLAPP motions in cases brought by consumers; and (2) the application of the anti-SLAPP statute in this case would impermissibly broaden the statute’s reach to all false advertising claims. Both section 425.16’s plain language and the case law refute those arguments.

### **A. There Is No “Corporate Defendant” Exception To The Anti-SLAPP Statute.**

There are at least two problems with amici’s argument that the anti-SLAPP statute does not cover the First Amendment activity of corporate defendants.<sup>21</sup> (Consumer Attorneys 25-26; Consumer Law Center 29.) First, whether section 425.16 is uniformly off-limits for corporate defendants is not before this Court, because Serova did not raise this as an issue for review, nor

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<sup>21</sup> The claim against Michael Jackson’s estate is brought via its co-executor, John Branca. This is not a corporation.



did the parties brief it. (See *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, fn. 8 [declining to reach issue identified by amicus, but not raised in petition for review or parties' briefing].)

Second, section 425.16's plain language does not distinguish among categories of defendants—it does not say, for example, that only individuals and non-profit organizations can bring anti-SLAPP motions. Indeed, on that basis, numerous courts have rejected the very argument that amici make here. In *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 843, the court held that the argument “has no basis in the statute itself and has been squarely rejected by other courts, and we do the same.” (See also, e.g., *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188 [“The term ‘person’ [as used in the anti-SLAPP statute] includes a corporation”].) If amici believe that the current scope of the statute does not fulfill the Legislature's goals, their remedy lies with the Legislature, not with this Court.

**B. The Court of Appeal's Decision Does Not Open The Door To Anti-SLAPP Protection For All Complaints Alleging False Advertising.**

Equally unavailing is amici's argument that the Court of Appeal's opinion would open the door for defendants to bring anti-SLAPP motions in a huge array of false advertising cases. (Consumer Law Center 23; Consumer Attorneys 12.) As an initial matter, as explained above, this is not a typical false advertising case and the speech at issue is not commercial. (See *infra*

Part I.) The Consumer Attorneys incorrectly contend that under *Serova* there will be an expansive application of the anti-SLAPP statute to cover lawsuits over food products because “[t]he contents and source of the food we eat is, and has long been, an issue of widespread public interest.” (Consumer Attorneys 12.)

The Legislature has specifically exempted from the anti-SLAPP statute “causes of action arising from representations of fact about the speaker’s or a competitor’s ‘business operations, goods, or services . . . 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’ or ‘made in the course of delivering the person’s goods or services.’” (*Simpson Strong Tie-Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 17, quoting § 425.17, subds. (d)(2).) But, relevant here, the Legislature *carved out* from this exemption—i.e., it permitted application of the anti-SLAPP statute—claims based on the creation, dissemination, advertising or promotion of an artistic work. (§ 425.17, subds. (d)(2) [section 425.17 exemption from anti-SLAPP protection does not apply to an action “based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work”].) The Legislature, thus, distinguished between artistic works, like *Michael*, and other types of consumer goods and services, and precluded anti-SLAPP protection only to the latter. That distinction disposes of the Consumer Attorneys’ argument that there is “simply no difference between a music album and a food

product,” (Consumer Attorneys 13), as well as amici’s broader claim that the Court of Appeal decision will subject lawsuits over all types of consumer products, including food labeling, to the anti-SLAPP statute.<sup>22</sup>

In arguing that sellers of art or music would always be able to shield themselves from liability for fraudulent or misleading commercial statements (Consumer Law Center 29), amici also misunderstand the scope and purpose of the anti-SLAPP statute.

First, statements are only protected by the anti-SLAPP statute if they are in furtherance of the right to free speech. (§ 425.16, subds. (b)(1), (e)(3) & (4).) Advertisements are in furtherance of the right to free speech if they are intertwined or adjunct to artistic expression (e.g. promotions that reflect the actors or characters in the works), or part of the works themselves. (*Infra* Part I.A; *Stutzman v. Armstrong* (E.D.Cal., Sept. 10, 2013, No. 2:13-CV-00116-MCE) 2013 WL 4853333, at \*7 [finding that “speech in the Books, about the Books, and the conduct in furtherance of that speech,” which included the book’s jacket and flyleaves, were in furtherance of defendants’ right of free speech].) But when advertisements lack this connection to artistic expression, they are not protected by the anti-SLAPP statute. (See,

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<sup>22</sup> The Consumer Attorneys assert the late singer Jimmy Dean could claim his “*creative work* also included his creation of a popular food product, ‘Jimmy Dean Pure Pork Sausage.’” (Consumer Attorneys 12, italics added.) As discussed above, it is well-established that listing ingredients to a food product is devoid of any artistic expression (*Infra* Part II.B), and falls squarely within the carve-out under Section 425.17.

e.g. *Rezec, supra*, 116 Cal.App.4th at p. 142 [statements in a fictitious critic review “did not reflect any character or portion of the films”].) Nothing about the Court of Appeal’s decision changes that distinction.

And even when the anti-SLAPP statute applies, this does not mean that a defendant will prevail. As this Court has repeatedly recognized, the anti-SLAPP statute does not automatically immunize defendants from liability; it is merely a tool for filtering out meritless claims. (E.g., *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940; *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385.)

Here, MJJ’s creation and distribution of the artistic work *Michael* was part and parcel of its right of free speech. The attribution of the Cascio Recordings to Michael Jackson provided information on the art, and was directly connected to and descriptive of the artistic work itself. Further, the identity of the artist of the Cascio Recordings was the subject of a specific public controversy and there was an undeniable public interest in Michael Jackson himself. Under *FilmOn*, MJJ’s speech is looked at in context (*FilmOn, supra*, 7 Cal.5th at p. 145), which includes the public discussion on the identity of the artist, and MJJ’s public statements on its investigations. MJJ’s attribution of the Cascio Recordings to Jackson *spoke directly* to the specific public controversy over whether Jackson was the vocalist. It made “a direct claim about the controversy itself,” and furthered the public discussion by “articulating a consistent and unqualified belief [that] the identity of the artist” was Michael Jackson. (*Serova, supra*, 44 Cal.App.5th at p. 109, italics

added.) In fact, if the Challenged Statements do not speak to the disputed issue of the identity of the artist, Serova has no claim because her claim rests entirely on the assertion that MJJ made false statements about the identity of the artist.

For these reasons, the Court of Appeal correctly held that the anti-SLAPP statute applies.

### CONCLUSION

For the foregoing reasons and the previously advanced, the Court should affirm the Court of Appeal's decision and hold that (1) the Challenged Speech is not commercial; and (2) the anti-SLAPP statute applies to Serova's claims.

Dated: April 30, 2021

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By: /s/ Zia F. Modabber

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## CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1) or 8.260(b)(1), I certify that this **DEFENDANTS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS** contains 8,143 words, not including the tables of contents and authorities, the caption page, the signature block, or this Certification page.

Date: April 30, 2021

/s/ Zia F. Modabber

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Zia F. Modabber

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Katten Muchin Rosenman LLP, 2029 Century Park East, Suite 2600, Los Angeles, California 90067-3012.

On April 30, 2021, I served the foregoing document **DEFENDANTS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS** as follows:

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Executed on April 30, 2021 at Los Angeles, California.



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4/30/2021

Date

/s/Zia Modabber

Signature

Modabber, Zia (137388)

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