S 244157

IN THE
SUPREME COURT OF CALIFORNIA

FILMON.COM, INC.,
Petitioner,

v.

DOUBLEVERIFY, INC.,
Respondent.

AFTER DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE
Case No. B264074

REPLY BRIEF ON THE MERITS

BAKER MARQUART LLP
Ryan G. Baker (Bar No. 214036)
Scott M. Malzahn (Bar No. 229204)
Blake D. McCay (Bar No. 272315)
2029 Century Park East, Suite 1600
Los Angeles, CA 90067
Telephone: (424) 652-7800
Facsimile: (424) 652-7850

Attorneys for Petitioner
FilmOn.com, Inc.

S 244157

IN THE
SUPREME COURT OF CALIFORNIA

FILMON.COM, INC.,
Petitioner,

v.

DOUBLEVERIFY, INC.,
Respondent.

AFTER DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE
Case No. B264074

REPLY BRIEF ON THE MERITS

BAKER MARQUART LLP
Ryan G. Baker (Bar No. 214036)
Scott M. Malzahn (Bar No. 229204)
Blake D. McCay (Bar No. 272315)
2029 Century Park East, Suite 1600
Los Angeles, CA 90067
Telephone: (424) 652-7800
Facsimile: (424) 652-7850

Attorneys for Petitioner
FilmOn.com, Inc.

TABLE OF CONTENTS

Page

INTRODUCTION.....1

ARGUMENT.....4

A. FilmOn Applies Principles of Statutory Interpretation.....4

1. The Plain Test Of the Catch-All Provision Requires Consideration Of the Commercial Nature of Speech And Other Relevant Factual Circumstances.....4

2. The Catch-All Provision Requires Examination Of The Particular Speech At Issue On A Case-By-Case Basis in Light Of The Overall Context.....7

3. The Structure Of Section 425.16 Mirrors Constitutional Principles, Which Should Guide This Court's Analysis 8

B. DoubleVerify's Heavy Reliance On The Commercial Speech Exemption Under Section 425.17(c) Is Misplaced.....12

1. The Commercial Speech Exemption Is Not At Issue In This Appeal.....13

2. Even If This Court Considers The Commercial Speech Exemption, It Does Not Support DoubleVerify's Interpretation Of The Catch-All Provision.....14

a. The Commercial Speech Exemption Only Addresses A Narrow Subset Of Commercial Speech And Does Not Alter The Analysis Under The Catch-All Provision 14

b. *OASIS* Was Wisely Decided.....17

c. The Structure of The Commercial Speech Exemption Confirms The Importance Of The Distinction Between Commercial and

Non-Commercial Speech Under The Anti-SLAPP Statute.....19

d. *Simpson* Is Inapposite.....20

C. DoubleVerify Misconstrues Case Law Regarding Limited Circumstances Where Private Communications Are Protected.....21

D. DoubleVerify's IQR Reports Are Purely Private Communication That Do Not Contribute Or Otherwise Further Public Debate or Discussion.....24

E. DoubleVerify's Description Of Its Service Makes Clear It Can Only Qualify Under The Rejected Synecdoche Theory Of Public Interest 26

CONCLUSION.....28

CERTIFICATE OF WORD COUNT.....29

PROOF OF SERVICE.....30

TABLE OF AUTHORITIES

Cases **Page(s)**

All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc. (OASIS)
(2010) 183 Cal. App. 4th 1186 ..... 3, 7, 17, 18

Annette F. v. Sharon S.
(2004) 199 Cal. App. 4th 1146 26

Averill v. Superior Court
(1996) 42 Cal. App. 4th 1170 22

Braun v. Chronicle Publishing Co.
(1997) 52 Cal. App. 4th 1036 ..... 4, 7, 9

Briggs v. Eden Council for Hope & Opportunity
(1999) 19 Cal. 4th 1106 ..... 5, 8, 15

Carver v. Bonds
(2005) 135 Cal. App. 4th 328 24

Chaker v. Mateo
(2012) 209 Cal. App. 4th 1138 24

Church of Scientology v. Wollersheim
(1996) 42 Cal. App. 4th 628 26

City of Cotati v. Cashman
(2002) 29 Cal. 4th 69 ..... 4, 5, 6, 13

City of Montebello v. Vasquez
(2016) 1 Cal. 5th 409 ..... 11, 12, 16

Commonwealth Energy Corp. v. Investor Data Exchange, Inc.
(2003) 110 Cal. App. 4th 26 ..... 26, 27

Consumer Justice Center v. Trimedica International, Inc.
107 Cal. App. 4th 595 (2003) 27

Contemporary Services Corp. v. Staff Pro Inc.
(2007) 152 Cal. App. 4th 1043 15

Cross v. Cooper
(2011) 197 Cal. App. 4th 357 23

Demetriades v. Yelp, Inc.
(2014) 228 Cal. App. 4th 294 17

Du Charme v. International Brotherhood of Electrical Workers, Local 45
(2003) 110 Cal. App. 4th 107 22

Equilon Enterprises v. Consumer Cause, Inc.
(2002) 29 Cal. 4th 53 ..... 4, 11, 15

Frisby v. Schutlz
(1998) 487 U.S. 474 9

Hailstone v. Martinez
(2008) 169 Cal. App. 4th 728 22

Hecimovich v. Encinal School Parent Teacher Organization
(2012) 203 Cal. App. 4th 450 23

International Federation of Professional & Technology Engineers, Local 21, AFL-CIO v. Superior Court
(2007) 42 Cal. 4th 319 10

International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles
(2010) 48 Cal. 4th 446 9

Integrated Healthcare Holdings, Inc. v. Fitzgibbons
(2006) 140 Cal. App. 4th 515 ..... 8, 22

JAMS, Inc. v. Superior Court
(2016) 1 Cal. App. 5th 984 19

Kasky v. Nike, Inc.
(2002) 27 Cal. 4th 939 ..... 18, 19

Nagel v. Twin Laboratories, Inc.
(2003) 109 Cal. App. 4th 39 ..... 5, 11

People v. Elsey
(2000) 81 Cal. App. 4th 948 10

Prigmore v. City of Redding
(2012) 211 Cal. App. 4th 1322 9

Rezec v. Sony Pictures Entertainment, Inc.
(2004) 116 Cal. App. 4th 135 7

Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO
(2003) 105 Cal. App. 4th 913 ..... 25, 27

Ruiz v. Harbor View Community Association
(2005) 134 Cal. App. 4th 1456 22

Simpson Strong-Tie Co., Inc. v. Gore
(2010) 49 Cal. 4th 12 ..... 19, 20

Terry v. Davis Community Church,
(2005) 131 Cal. App. 4th 1534 23

Vogel v. Felice
(2005) 127 Cal. App. 4th 1006 22

Wilbanks v. Wolk
(2004) 121 Cal. App. 4th 883 24

Wong v. Tai Jing
(2010) 189 Cal. App. 4th 1354 24

World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.
(2009) 172 Cal. App. 4th 1561 ..... 7, 11, 17

Statutes

Cal. Civ. Proc. Code § 425.16 ..... *passim*

Cal. Civ. Proc. Code § 425.17(c) 15, 20

Cal. Civ. Proc. Code § 426.16 ..... 9, 25

Other Authorities

Oxford English Thesaurus 2018 24

Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515
(2003-2004 Reg. Sess.) 15, 16, 17

Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1296
(1997-1998 Reg. Sess.) 10

IN THE
SUPREME COURT OF CALIFORNIA

FILMON.COM, INC.,
Petitioner,

v.

DOUBLEVERIFY, INC.,
Respondent.

AFTER DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE
Case No. B264074

REPLY BRIEF ON THE MERITS

INTRODUCTION

California enacted anti-SLAPP law to protect the "valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Code Civ. Pro. § 425.16(a). Although anti-SLAPP law is construed broadly, its application has limits. This case presents conduct outside those limits. This Court should clarify that a commercial entity cannot distort the important protections of the anti-SLAPP statute to shield itself from liability for false and misleading statements made to a paying audience of one.

Defendant DoubleVerify, Inc.'s ("DoubleVerify's") false and misleading confidential reporting about websites operated by FilmOn.com, Inc. ("FilmOn") is not speech or petitioning activity protected by anti-SLAPP law. No matter how broadly the statute is construed, DoubleVerify's private, commercial speech was not an exercise of its constitutional right to petition; nor was DoubleVerify's activity connected

to "a public issue or an issue of public interest." Cal. Code Civ. Pro. § 425.16(e)(4). DoubleVerify's conduct does not fall within the statute's "catch-all" provision. *See Id.*

Particularly when applying the anti-SLAPP catch-all provision, the Legislature intended courts to follow fundamental constitutional principles in evaluating challenged conduct. The plain statutory text requires that a court examine both the content and *context* of the speech at issue to determine whether speech satisfies the "arises from," "in furtherance of," and "public interest" requirements. "In furtherance of" is superfluous if the catch-all provision is focused solely on the content of the speech, as DoubleVerify asserts.

Likewise, the overall structure and legislative history of Section 425.16 support FilmOn's interpretation. The anti-SLAPP statute protects the constitutional rights of freedom of petition and freedom of speech. Consistent with that purpose, the Legislature established a statutory framework that borrows from and reflects well-established constitutional principles. Clauses (1) – (2) of Section 425.16(e) protect all speech that takes place before or in connection with official governmental proceedings on a *per se* basis and clause (3) extends to any speech on a public issue so long as it takes place in a public forum. In contrast, the catch-all provision in clause (4) requires a court to analyze the particular content of the speech and the surrounding circumstances to render case-by-case determinations. Commercial speech occupies a less protected status under constitutional law and the anti-SLAPP statute.

DoubleVerify's heavy reliance on the commercial speech exemption under Section 425.17(c) is misplaced. Not only is that exemption not at issue here, the exemption does not change the statutory analysis under the catch-all provision. When the Legislature enacted Section 425.17(c), it exempted only a narrow subset of commercial speech and otherwise left

pre-existing law intact. Courts should consider the commercial nature of the speech at issue in determining whether such speech furthers constitutional rights in connection with an issue of public interest, even where that speech is not exempt under Section 425.17(c). *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.* (*"OASIS"*) (2010) 183 Cal. App. 4th 1186.

None of the relevant authority suggests ignorance of the factual context of challenged speech. Yet, like an ostrich with its head in the sand, DoubleVerify urges this Court to ignore countless undisputed facts, inducing the following: DoubleVerify is a commercial business; it sells IQR Reports to other businesses for commercial purpose; it tailors each IQR report to the individual needs of a particular customer; DoubleVerify's customers use the IQR Reports to formulate advertising strategies, whether those strategies promote Disneyland or pornography; DoubleVerify's customers are contractually required to keep these reports confidential; and DoubleVerify's reports do not contribute to any public discussion.

DoubleVerify's argument that its confidential IQR Reports are protected because they contain a couple of tags that label FilmOn as a copyright infringer and a purveyor of adult content and therefore relate in some general way to larger issues of interest to the public has been repeatedly rejected by courts. DoubleVerify does not disseminate its reports to the public; its reports do not arise out of any ongoing controversy or contribute to any public discussion.

If DoubleVerify's confidential IQR Reports are protected, it is difficult to imagine any commercial speech that would not also be protected. The insulation of purely commercial activities such as those of DoubleVerify is not the intention of the anti-SLAPP statute. This Court should protect the integrity of the anti-SLAPP statute and reverse the decision below.

ARGUMENT

A. FilmOn Applies Principles of Statutory Interpretation.

When interpreting statutes, "we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law[.]" (*City of Cotati v. Cashman* (2002) 29 Cal. 4th 69, 75.) In analyzing provisions in the anti-SLAPP statute, the legislative intent underlying section 425.16 must be " 'gleaned from the statute as a whole[.]' " (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 60 (quoting *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1118).) "[L]egislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole, which includes the particular directives." (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal. App. 4th 1036, 1048.)

The text of the catch-all provision specifically refers to activity "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest" (Code Civ. Proc. § 425.16(e)(4)), and the structure of the anti-SLAPP statute confirms that this Legislature intended the statute to reflect constitutional principles. It would violate settled principles of statutory interpretation to ignore this structure and the express reference to constitutional rights in the definition of protected activity in the catch-all provision.

1. The Plain Text Of The Catch-All Provision Requires Consideration Of The Commercial Nature Of Speech And Other Relevant Factual Circumstances.

DoubleVerify's claim that to consider the commercial or business nature of the speech at all is to impermissibly impose new requirements on the catch-all provision (ROB at 33-34) is meritless. Such considerations are not new burdens, but part and parcel of any analysis of whether the

speech in question "arises from," is "in furtherance of" rights to free speech and concerns a matter of public interest.

As DoubleVerify concedes, to fall within the protection of this provision, the defendant bears the burden of proving that the "plaintiff's claim (1) 'arises from'; (2) 'conduct in furtherance of the exercise of . . . the exercise of . . . the constitutional right of free speech'; (3) 'in connection with'; (4) 'a public issue or an issue of public interest.'" (ROB at 44 (quoting Code Civ. Proc. § 425.16(e)(4)).) Each of these requirements impose substantive limits on the catch-all provision and must be read as a whole. "We must give meaning to th[e] statutory [language], under settled principles of statutory construction." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1118.)

While DoubleVerify claims that the catch-all provision focuses solely on the content of speech, it is not sufficient that a defendant demonstrate the content of the speech concerns a matter of public interest. The parties agree the "in furtherance of" requirement in the catch-all provision is an additional requirement above and beyond the public interest requirement, which requires that the conduct at issue "'help advance or facilitate the exercise of free speech rights.'" (ROB at 44 (quoting *Collier v. Harris* (2015) 240 Cal. App. 4th 41, 53).) Likewise, to satisfy the "arises from" requirement, this Court has held that the conduct underlying the plaintiff's cause of action (here, the publication of an IQR report on a confidential basis to a DoubleVerify customer) "must *itself* have been an act in furtherance of the right of petition or free speech[.]" (*City of Cotati,* 29 Cal. 4th at 78 (emphasis in original).) Even the public interest requirement must be considered within the overall context of the allegedly protected activity. (*See Nagel v. Twin Labs., Inc.* (2003) 109 Cal. App. 4th 39, 47 ("the language 'in connection with a public issue' modifies earlier language in the statute referring to the acts in furtherance of the

constitutional right of free speech. The phrase cannot be read in isolation").) Accordingly, the defendant must show a causal relationship between the particular conduct at issue and the exercise of free speech or petition rights.

Here, DoubleVerify does not dispute that its IQR Reports constitute commercial speech and it uses self-serving and largely tautological statements to claim that those reports satisfy the "in furtherance of", "arises from" and public interest requirements. (*See, e.g.,* ROB at 56 (asserting "DoubleVerify's reports satisfy the [public interest] requirement because their creation and dissemination are acts constituting the exercise of DoubleVerify's right to free speech.").) In fact, DoubleVerify's wholly confidential IQR Reports do not arise from or further any constitutional right of free speech in connection with a public issue. Its purpose is merely to generate business by providing a service on a confidential basis to assist companies with the placement of online advertisements. While there is nothing wrong with this business model, the catch-all provision is not so broad as to insulate DoubleVerify from liability when its activities clearly have no role in encouraging continued participation in matters of public significance.

FilmOn previously cited multiple well-reasoned cases in which appellate and trial courts have considered the identity of the speaker, audience and content of the speech in concluding that the speech at issue is not protected under Section 425.16. (*See* POB at 20-24.) DoubleVerify largely ignores these cases. Its only answer is that FilmOn's cases are "outdated" and "inapposite" because they were decided before the adoption of the commercial speech exemption in 2003. (ROB at 39.) Not so. All the cases cited by FilmOn remain good law. There is no authority for the proposition that these cases were superseded by the enactment of the

commercial speech exemption.[1] To the contrary, the Legislature clearly approved of and implicitly endorsed the logic of these decisions when it enacted the commercial speech exemption. In any event, FilmOn cited several cases post-dating the 2003 enactment of the commercial speech exemption, which explicitly discussed the commercial nature of the speech at issue when assessing whether that speech was in furtherance of a constitutional right. (*See OASIS,* 183 Cal. App. 4th 1186; *Rezec v. Sony Pictures Ent., Inc.* (2004) 116 Cal. App. 4th 135; *World Fin. Grp., Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 1573.)

2. The Catch-All Provision Requires Examination Of The Particular Speech At Issue On A Case-By-Case Basis In Light Of The Overall Context.

DoubleVerify's contention that the text of the catch-all provision is focused solely on the content (not the context) of speech is meritless. (ROB at 28.) If anything, the catch-all provision requires greater factual examination of the surrounding circumstances than a showing under the other categories of protected activity in subdivision (e).

Clauses (1) and (2) protect all statements "made before" or "in connection with" "a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law[.]" (Code Civ. Proc. § 425.16(e)(1) & (2).) When "crafting" these clauses, the Legislature "equated a public issue with the authorized official proceeding to which it connects." (*Braun,* 52 Cal. App. 4th at 1047.) "[I]t is the context or setting itself that makes the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding." (*Id.*) In other words, the defendant does not have to make any additional

[1] FilmOn discusses the interaction between Sections 425.16 and 425.17 in detail below. (*See infra* at B(2).)

showing that the particular speech at issue was made in furtherance of the exercise of constitutional rights in connection with an issue of public interest. (*See also Briggs,* 19 Cal. 4th at 1122 ("In effectively deeming statements and writings made before or connected with issues being considered by any official proceeding to have public significance per se, the Legislature afforded trial courts a reasonable, bright-line test applicable to a large class of potential section 425.16 motions").)

In contrast, the catch-all provision does not protect any particular category of speech on a *per se* basis. Nor does it presume that speech that occurs in any particular place (such as in official government proceedings or a public forum) furthers the exercise of constitutional rights. Instead, the catch-all provision requires a court to analyze the factual circumstances surrounding the speech at issue on a case-by-case basis to determine whether the speech meets the "arises from," "in furtherance of" and "public interest" limitations. (*See Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal. App. 4th 515, 526 ("[a]lthough in most cases a competitor's statements regarding its competition would not fall within section 425.16, subdivision (e)(4), we decline to adopt a per se rule excluding all competitor's statements from anti-SLAPP protection. Instead, we must consider each case in light of its own unique facts.").)

3. The Structure Of Section 425.16 Mirrors Constitutional Principles, Which Should Guide This Court's Analysis.

DoubleVerify's contention that constitutional principles have no place in an analysis of the anti-SLAPP statute is meritless. The Legislature structured Section 425.16 to mirror constitutional principles and it placed great importance on the setting or context where the allegedly protected conduct occurred. While it is true that DoubleVerify does not need to prove that its IQR Reports are themselves constitutionally protected,

fundamental principles of constitutional law (including the context within which the speech at issue arose) should guide a court's decision-making under the catch-all provision.

The entire structure of the anti-SLAPP statute is designed to protect "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc. §§ 426.16(a), 426.16(b)(1).) The Legislature defined what acts are "in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" in subdivision (e) of Section 425.16. The first two clauses in subdivision (e) protect favored categories of speech closely linked to civic participation in government, which lie at the core of free speech and petition rights. (*See Braun,* 52 Cal. App. 4th at 1047 (explaining that clauses (1) and (2) "safeguard free speech and petition conduct aimed at advancing self government").) Likewise, clause (3) protects speech that takes place in a public forum, which traditionally has been associated with heightened free speech protections. (*Prigmore v. City of Redding* (2012) 211 Cal. App. 4th 1322, 1335-38.) Indeed, under both federal and California law, courts frequently focus on "the 'place' of th[e] speech" or "the nature of the forum" in determining the appropriate level of protection for the speech at issue. (*Frisby v. Schutlz* (1998) 487 U.S. 474, 479-80; *see also Int'l Soc'y for Krishna Consciousness of California, Inc. v. City of Los Angeles* (2010) 48 Cal. 4th 446, 454.)

Contrary to DoubleVerify's contention that only clauses (1) and (3) of Section 425.16(e) require consideration of the context that gave rise to the speech or other conduct at issue, the context is important under all four clauses. While clause (2) is not limited to statements "made before" official government proceedings, the statements at issue must still be made in connection with "a legislative, executive, or judicial proceeding, or any

other official proceeding authorized by law" to fall within clause (2). (Code Civ. Proc. § 425.16(e)(2).) Additionally, as DoubleVerify acknowledges (ROB at 28), clauses (1) and (3) both focus heavily on the setting or context of the speech. They protect any statements "made before" official government proceedings and statements "made in a place open to the public or a public forum in connection with an issue of public interest." (Code Civ. Proc. § 425.16(e)(1) & (3).) So long as the speech was made in a place open to the public or a public forum in connection with an issue of public interest, it is presumed that the speech is in furtherance of the exercise of constitutional rights. (*See id.*)

When the Legislature amended the anti-SLAPP statute in 1997, it structured clause (4) as a catch-all to extend the protections of the statute beyond those specific activities protected by the preceding clauses to "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16(e)(4).) The purpose of the catch-all provision is to ensure that other conduct worthy of protection would not be omitted simply because it did not take place in connection with an official proceeding or in a public forum. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) as amended May 12, 1997.)

While clause (4) is not limited to conduct that arises in any particular place or forum, it should be interpreted in a manner that is consistent with the preceding categories of protected activity. Where, as here, a statute lists a series of specific categories followed by a more general category, the general category is "restricted to those things that are similar to those which are enumerated specifically." (*Int'l Fed'n of Prof'l & Tech. Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal. 4th 319, 342 (internal citations omitted); *see also People v. Elsey* (2000) 81 Cal. App. 4th 948,

959 (ruling that "other building" in a statute "is a catch-all phrase that follows a list of specific items, which is meant not to describe a particular structure but to incorporate additional structures of the type previously listed, in accordance with the canon of statutory construction, ejusdem generis").) Indeed, the catch-all provision – by referring to "other conduct" – clearly refers back to clauses (1) through (3) as setting forth other examples of conduct that the Legislature has deemed to be "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16 (e)(4).)

Like clauses (1)-(3), the catch-all provision should be interpreted consistently with fundamental constitutional principles. Treating commercial speech with more scrutiny in the anti-SLAPP context is consistent with the purpose of the SLAPP statute, which is to keep large and powerful interests from silencing free speech through the threat of economic ruination by litigation. (*See Equilon Enterprises LLC,* 29 Cal. 4th at 68 n.5.) Commercial speech is entitled to less protection under the constitution (in part because speech with an economic motivation is far less likely to be stamped out by regulation or litigation), so the nature of the particular speech at issue necessarily weighs on whether such speech is truly in furtherance of constitutional rights. (*See Nagel,* 109 Cal. App. 4th at 47*; World Fin. Grp., Inc.*, 172 Cal. App. 4th at 1569.)

DoubleVerify's reliance on *City of Montebello v. Vasquez* (2016) 1 Cal. 5th 409 is misplaced. While that case held that courts "are not *required* to wrestle with difficult questions of constitutional law" in determining whether speech is protected the anti-SLAPP statute (*id.* at 422), it does prohibit this court from considering the commercial nature of speech under the catch-all provision. This Court reasoned that "the councilmembers' votes, as well as statements made in the course of their

deliberations at the city council meeting where the votes were taken, qualify as 'any written or oral statement or writing made before a legislative . . . proceeding'" under clause (1). (*Id.* (quoting Code Civ. Proc. § 425.16(e)(1)).) And, it found that "[a]nything they or City Administrator Torres said or wrote in negotiating the contract qualifies as 'any written or oral statement or writing made in connection with an issue under consideration or review by a legislative . . . body'" under clause (2). (*Id.* (quoting Code Civ. Proc. § 425.16(e)(2)).) Because the legislature had statutorily defined the acts in clauses (1) and (2) as protected, there was no need for the defendant to prove that the acts at issue were themselves constitutionally protected. (*Id.* at 422 (explaining that the Legislature defined specific activities that qualify as an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" in clauses (1) and (2)).)

Importantly, *City of Montebello* did not analyze the catch-all provision. Nor did it close its eyes to constitutional principles. Rather, it found the activity at issue furthered the exercise of constitutional rights, reasoning that "participation" in council member meetings is "constitutionally protected activity" and "legislators are given the widest latitude to express their views" under the First Amendment. (*Id.* at 423 (internal citations omitted).)

B. DoubleVerify's Heavy Reliance On The Commercial Speech Exemption Under Section 425.17(c) Is Misplaced.

DoubleVerify acknowledges that the analysis under the commercial speech exemption "is separate and distinct from the analysis to determine protected speech under Section 425.16." (ROB at 29.) Despite this admission, it repeatedly argues that FilmOn cannot satisfy its burden of proving that the commercial speech exemption applies and waived any argument under this exemption. (*Id.* at 22-23.) These arguments are red

herrings. This appeal involves the catch-all provision, not the commercial speech exemption.

Even if this Court considers the commercial speech exemption, the statutory text, legislative history, and case law do not support DoubleVerify's contention that this exemption precludes courts from considering whether other forms of commercial speech fall outside the catch-all provision.

1. The Commercial Speech Exemption Is Not At Issue In This Appeal.

This Court granted *certiorari* to consider whether "a court [should] take into consideration the commercial nature of [] speech" in determining whether that speech "furthers the exercise of constitutional free speech rights on a matter of public interest within the meaning of the catch-all provision in the anti-SLAPP statue[.]" (Petition for Review at 2.) As it must, DoubleVerify concedes that it bears the "burden of proof" under the first step of the anti-SLAPP analysis. (*See* ROB at 30 (stating "the defendant's burden of proof is to make 'a threshold showing that the challenged cause of action is one arising from protected activity'").) It is undisputed that DoubleVerify's IQR Reports are not protected under clauses (1) through (3) of Section 425.16(e). Thus, the sole question is whether those reports qualify for protection under the catch-all provision.[2]

While it is true that a plaintiff bears the burden of proving the applicability of the commercial speech exemption (ROB at 30-31), FilmOn

[2] DoubleVerify spills considerable ink to argue that FilmOn's case lacks merit. (ROB at 16-20.) In actuality, DoubleVerify's Reports made misleading and false representations regarding FilmOn's business and the content available on its websites. In any event, this Court did not grant *certiorari* on the second step of the anti-SLAPP analysis. Thus, there is no need for this to Court to "reach the anti-SLAPP statute's secondary question whether [FilmOn] 'established that there is a probability that [FilmOn] will prevail on the claim.'" (*City of Cotati,* 29 Cal. 4th at 81 (quoting Code Civ. Proc. § 425.16(b)(1)).)

does not and has never relied on the commercial speech exemption. Nor did this Court grant *certiorari* to examine whether the commercial speech exemption is applicable to this case. Thus, it is unnecessary to consider whether DoubleVerify's confidential IQR Reports fall within Section 425.17. This Court should reject DoubleVerify's attempts to shift the burden of proof to FilmOn.

2. Even If This Court Considers The Commercial Speech Exemption, It Does Not Support DoubleVerify's Interpretation Of The Catch-All Provision.

Far from undermining FilmOn's interpretation, Section 425.17(c) confirms that commercial speech occupies a less protected status under the anti-SLAPP statute than other forms of speech. It does not – as DoubleVerify suggests – render the well-established distinction between commercial and non-commercial speech immaterial for the purposes of the catch-all provision.

a. The Commercial Speech Exemption Only Addresses A Narrow Subset Of Commercial Speech And Does Not Alter The Analysis Under The Catch-All Provision.

DoubleVerify's argument that the legislature intended Section 425.17(c) to "exclusively define commercial speech for purposes of the anti-SLAPP statute" (ROB at 35) is not supported by the statutory text, legislative history or case law. The Legislature did not intend to change or otherwise alter anti-SLAPP analysis under Section 425.16 when it enacted Section 425.17(c), save for taking certain very narrow categories outside of the analysis altogether.

When the Legislature amended the anti-SLAPP statute in 2003 to add the exemptions set forth in Section 425.17, it did not make any changes to Section 426.16. It did not amend the catch-all provision to state that all commercial speech not exempted by Section 425.17(c) is protected activity.

If the Legislature had intended to do that, it could easily have done so. It did not. It is not the province of this Court to re-write the catch-all provision to protect all commercial speech that falls outside of Section 425.17(c). (*Equilon Enter., LLC,* 29 Cal. 4th at 66.)

The commercial speech exemption was drafted to exempt a narrow subset of commercial speech. Although the exemption has been described as applying to claims arising from "commercial speech" (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal. App. 4th 1043, 1047), that description is overbroad. In fact, the bill only "excludes *some* commercial speech from the anti-SLAPP motion" altogether. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.), as amended July 8, 2003, p. 3) (italics added); *see also id* as amended May 1, 2003, pp. 11-12 (noting the bill merely states that anti-SLAPP procedures "are not applicable to the specified type of commercial speech.").) To fall within the commercial speech exemption, a cause of action must satisfy several concrete and specific criteria:

> (1) the defendant must be "a person primarily engaged in the business of selling or leasing goods or services" (Code Civ. Proc. § 425.17(c));
> (2) the plaintiff's cause of action must "arise[ ] from a [ ] statement or conduct by" the defendant (*id.*);
> (3) the statement or conduct must be of a type qualifying the cause of action for exemption (*id.* § 425.17(c)(1)); and
> (4) the statement must be addressed to or intended to reach a qualifying audience, or be made in a qualifying setting (*id.* § 425.17(c)(2)).

Much like the bright-line test established by clauses (1) and (2) of Section 425.16(e) for speech made before or in connection with official governmental proceedings,[3] the commercial speech exemption creates a

---

[3] (*See Briggs,* 19 Cal. 4th at 1122 (explaining that clauses (1) and (2) create a "bright-line test" for determining what speech is protected).)