No. S260736

In the Supreme Court of the State of California

VERA SEROVA,
Plaintiff and Respondent,

v.

SONY MUSIC ENTERTAINMENT, et al.,
Defendants and Appellants.

Second Appellate District, Case No. B280526
Los Angeles County Superior Court, Case No. BC548468
Hon. Ann I. Jones, Judge

AMICUS CURIAE BRIEF OF THE CALIFORNIA ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF AND RESPONDENT

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INTRODUCTION AND STATEMENT OF INTEREST

The Attorney General of California submits this amicus brief to address the second issue presented: "For purposes of liability under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.)," do "representations a seller made about a creative product on the product packaging and in advertisements" "constitute commercial speech, and does it matter if the seller lacked personal knowledge that the representations were false? (See *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939.)" (OBM 6.) The answers to these questions are of significant importance for the Attorney General's efforts to protect consumers across the State from inaccurate or misleading information in the commercial marketplace.

As this Court has recognized, product advertising and "labels matter." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 328.) "The marketing industry is based on the premise that . . . consumers will choose one product over another similar product based on its label and various tangible and intangible qualities they may come to associate with a particular source." (*Ibid.*) False or misleading information can deceive a consumer into buying a product she does not want; paying more for a product than she otherwise would; or worse, purchasing a product and using it in a way that harms her health or well-being. Unchecked, commercial falsehoods can chip away at consumer confidence, undermining trust in all manner of businesses, honest and dishonest alike. For these reasons, the Attorney

General vigorously enforces the State's consumer protection statutes—including the same statutes invoked by the plaintiff in this case—to redress and prevent consumer deception and safeguard the integrity of California's marketplace.

The First Amendment erects no bar to such enforcement actions—whether brought by the State, a local government, or as here, a private plaintiff. This Court and the U.S. Supreme Court have long recognized that a seller's false or misleading descriptions of its commercial product are not constitutionally protected. A principal reason for extending some measure of First Amendment protection to commercial expression is to ensure consumer access to *truthful* information about commercial products. Allowing businesses to hoodwink or otherwise mislead consumers with falsities would in no way further that aim—indeed, it would frustrate it.

The circumstances of this case require no departure from these settled constitutional principles. Defendant distributors of the album *Michael* (collectively, Sony) stated on the product label and in advertisements that Michael Jackson performed all of the album's songs.[1] Plaintiff alleges, and for present purposes it is stipulated, that Jackson did not sing three of the tracks on the posthumous album. That false description of a commercial product is a classic form of commercial speech that is unprotected

[1] The album's distributors included Sony Music Entertainment, MJJ Productions, Inc., and Michael Jackson's estate. (ABM 12.) This brief refers to them collectively as "Sony."

by the First Amendment. The product description was not transformed into "noncommercial" expression, as the Second Appellate District concluded below, because Sony purportedly lacked personal knowledge of the inaccuracy; because the product for sale (music) is a constitutionally protected form of entertainment; or because there was an ongoing controversy among Michael Jackson's fan base and the public more generally about the authenticity of the three songs in question.

The First Amendment should not privilege a seller's misrepresentations simply because the seller lacks firsthand knowledge whether or not its claims are false. A contrary rule would reward sellers who avoid reasonable investigations into their products, supply chains, and subcontractors, while disadvantaging sellers who act with honesty and transparency. It would also seriously erode consumer rights. Under California's consumer protection laws, buyers have a right to be accurately informed about the content and authenticity of the products they purchase—whether or not related to an entertainment medium, and whether or not connected in some way to a public figure or controversy of public interest.

The Second District's analysis to the contrary should be rejected.

LEGAL BACKGROUND

The Court granted review to address two distinct questions: first, whether Sony's claims about the authenticity of three songs on the *Michael* album were made "in connection with a public issue or an issue of public interest" for purposes of California's

anti-SLAPP statute (Code Civ. Proc., § 425.16, subd. (e)), and second, as noted above, whether Sony's claims qualify as commercial speech that may constitutionally be subjected to liability under the State's consumer protection statutes, including the Unfair Competition Law. (See OBM 6.) Because the Attorney General addresses only the latter question, this brief focuses on California's consumer protection statutes, as well as the First Amendment principles relevant to their application.[2]

A. The Development of False Advertising Law

At the dawn of the twentieth century, the law provided little protection for consumers. Modern statutory regimes regulating false advertising did not yet exist. It was the era of "*caveat emptor*"—let the buyer beware. (Hamilton, *The Ancient Maxim Caveat Emptor* (1931) 40 Yale L.J. 1133, 1178-1185); see also *Nationwide Biweekly Admin., Inc. v. Superior Court* (2020) 9 Cal.5th 279, 322.) That left it to consumers "to take care of [their] own interests" (*Barnard v. Kellogg* (1870) 77 U.S. 383, 388), to the extent they could do so, which they often could not. "[P]urchase [was] a game of chance" (Hamilton, *supra*, 40 Yale L.J. at p. 1187), and "it was well established that a seller's statements should not be trusted" (Petty, *The Historic*

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[2] The Attorney General leaves the anti-SLAPP issue to the parties in part because that statute does "not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." (Code Civ. Proc., § 425.16, subd. (d).)

Development of Modern U.S. Advertising Regulation (2015) 7 J. Hist. Res. Marketing 524, 526).

Indeed, "fraudulent advertising was everywhere countenanced." (Hess, *History and Present Status of the "Truth-in-Advertising" Movement* (1922) 101 Annals Am. Acad. Pol. & Soc. Sci. 211, 211.) It was common, for example, for vendors to peddle "patent medicines," advertising phony cures for ills ranging from cancer to tuberculosis to colic when, in fact, the medicines contained worthless or even dangerous components. (Litman & Litman, *Protection of the American Consumer* (1981) 36 Food Drug Cosm. L.J. 647, 651; see also *id.* at p. 652.) Unbeknownst to the purchaser, patent medicine ingredients could include "opium, morphine, cocaine, laudanum, and alcohol." (*Id.* at p. 652.) Mail fraud schemes ran rampant with offers for grossly misrepresented products, such as sewing needles advertised as "complete sewing machine[s]" or postage stamps advertised as "steel engraving[s]." (Petty, *supra*, 7 J. Hist. Res. Marketing at p. 529.) And farmers were often led to believe that they were purchasing healthy animals, only to discover after paying in full that the animals were diseased. (See Hamilton, *supra*, 40 Yale L.J. at p. 1181.) Other examples abound.

At the beginning of the last century, the common law theoretically offered avenues for redress, but in practice, available remedies were only that: theoretical. "The common law of tort placed significant barriers in the path of a consumer who had been misled by a seller"—in particular, imposing a "requirement of intent and scienter" that was "difficult" and

"expensive" to prove. (Pridgen & Alderman, Consumer Protection and the Law (2020-2021 ed.) §§ 1:1, 2:9; see also Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor* (1964) 24 Fed. Bar J. 548, 550.) Injured consumers also typically had to show that they "justifiabl[y]" relied on the misrepresentation—a "heavy burden" in an era where "prevailing norms expected sellers to lie and buyers to distrust." (Pridgen & Alderman, *supra*, § 2:5; see also Rest.2d Torts, § 537, com. b.)

This state of affairs eventually proved untenable both for consumers and for honest businesses frustrated by their inability to distinguish themselves from deceitful competitors. (See Petty, *supra*, 7 J. Hist. Res. Marketing at p. 530; Note, *The Regulation of Advertising* (1956) 56 Colum. L.Rev. 1018, 1060.) Consumer groups and industry trade associations successfully pressured legislatures to act. By 1927, some twenty-five States had adopted a model statute (or a close variant of it) called the Printer's Ink statute, making it a misdemeanor to engage in any form of "untrue, deceptive or misleading" advertising. (Comment, *Untrue Advertising* (1927) 36 Yale L.J. 1155, 1156, fn. 6; see also *id.* at p. 1157.) Over time, virtually all States followed suit. (See *Developments in the Law—Deceptive Advertising* (1967) 80 Harv. L.Rev. 1005, 1018-1019.)[3]

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[3] The model statute was first proposed in 1911 by *Printer's Ink*, a trade association journal for the advertising industry. (*Untrue Advertising*, *supra*, 36 Yale L.J. at pp. 1156-1157.)

And at the federal level, Congress created the Federal Trade Commission in 1914, charging it with policing "[u]nfair methods of competition" and "unfair or deceptive acts or practices." (15 U.S.C. § 45(a)(1).)[4] The FTC drew on that authority to investigate and punish any advertising that had a "tendency or capacity to deceive." (Pridgen & Alderman, Consumer Protection and the Law, *supra*, § 8:1.) The "seller's intent to deceive was irrelevant" (*ibid.*), and consumers no longer had a "duty . . . to suspect the honesty of those with whom [they] transact[ed] business" (*FTC v. Standard Educ. Soc.* (1937) 302 U.S. 112, 116). For the first time, the law began to "protect the trusting as well as the suspicious." (*Ibid.*; see Pridgen & Alderman, *supra*, § 10:2.)

In the second half of the twentieth century, a second wave of reform swept the country. President Kennedy famously recognized four basic consumer rights: the "right to safety," the "right to choose," the "right to be heard," and—most pertinent here—the "right to be informed."[5] Inspired by that declaration, and frustrated by meager federal enforcement efforts and the limits of the underenforced Printer's Ink statutes (see, e.g., *Developments in the Law*, *supra*, 80 Harv. L.Rev. at p. 1019),

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[4] See Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 719; Wheeler-Lea Amendment of 1938, ch. 49, § 3, 52 Stat. 111; see also *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.

[5] The White House, Special Message to Congress on Protecting Consumer Interest (Mar. 15, 1962) <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/037/JFKPOF-037-028>.

numerous state legislatures enacted more robust consumer protection laws. (See Pridgen & Alderman, Consumer Protection and the Law, *supra*, § 1:1; Braucher, *Deception, Economic Loss and Mass-Market Customers* (2006) 48 Ariz. L.Rev. 829, 830.) These statutes, often called "[l]ittle FTC Acts" (Pridgen & Alderman, *supra*, § 2:10), removed common law requirements of intent and reliance, and often proscribed deceptive advertising on a strict liability basis. (See *id.* §§ 2:9, 3:2.) And in "recognition of the fact that many consumer cases involve claims so small that litigation expenses would often exceed the expected return," the Acts allowed "aggrieved consumers to recover not only their actual damages, but also minimum or multiple damages, attorney's fees, and costs." (*Id.* § 2:9.)

Congress expanded false advertising restrictions as well. In 1975, it gave the FTC greater rulemaking powers and remedial authority. (See Pridgen & Alderman, Consumer Protection and the Law, *supra*, §§ 1:1, 8:1.) And in 1988, Congress extended the Lanham Act, the federal trademark statute, to bar false advertising on a strict liability basis. (See 15 U.S.C. § 1125(a); Trademark Law Revision Act of 1988, Pub.L. No. 100-667, § 132 (Nov. 16, 1988), 102 Stat. 3946.) This extension allowed one business to sue another that "falsely described its own product or that of the plaintiff." (Klein, *The Ever-Expanding Section 43(a)* (1993) 2 U. Balt. Intell. Prop. L.J. 65, 69; see also Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law* (2011) 159 U. Pa. L.Rev. 1305, 1310.)

B. California Statutes Prohibiting False Advertising

California was no exception to—and, in many ways was ahead of—the trends discussed above. Years before *Printer's Ink* first proposed its model statute (*ante*, at p. 20), the California Legislature criminalized false advertising, later amending the provision to conform it to the *Printer's Ink* proposal.[6] Like at least ten other States, however, California limited the statute's scope by adding "the requirement that the advertiser know, or be reasonably charged with knowledge of, the falsity of his statements." (*Regulation of Advertising*, *supra*, 56 Colum. L.Rev. at p. 1060 & fn. 257.) That "scienter requirement" remains a part of today's version of the statute—called the False Advertising Law (FAL)—which supplements criminal penalties with a "civil cause of action" for injunctive relief, restitution, and civil penalties. (*Nationwide Biweekly*, *supra*, 9 Cal.5th at pp. 305-306 & fn. 11; see also Bus. & Prof. Code, §§ 17500, 17535, 17535.5.)

In 1933, California significantly expanded the State's consumer protection regime by enacting the Unfair Competition Law (UCL). The "UCL's scope is broad." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) In addition to proscribing "any unlawful, unfair or fraudulent business act or practice," the UCL specifically forbids "unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200; see Stats. 1933, ch.

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[6] See Stats. 1905, ch. 254, § 1, p. 227 [original provision]; Stats. 1915, ch. 634, § 1, p. 1252 [conforming provision to *Printer's Ink* proposal].

953, § 1, p. 2482; *Nationwide Biweekly*, *supra*, 9 Cal.5th at p. 309, fn. 13.) Unlike the FAL, however, the UCL does not impose a scienter requirement. To state a claim, "it is necessary only to show that" a seller's claim is false or that "'members of the public are likely to be deceived.'" (*Kasky*, *supra*, 27 Cal.4th at p. 951; see also *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 181 ["The UCL imposes strict liability"].) As with the FAL, "[i]n a suit under the UCL, a public prosecutor may collect civil penalties," and a private plaintiff may seek "injunctive relief and restitution." (*Kasky*, *supra*, 27 Cal.4th at p. 950.)

Finally, in 1970, the Legislature enacted the Consumers Legal Remedies Act (CLRA), a statute providing a private cause of action for consumers to redress nearly 30 specifically enumerated "unfair methods of competition and unfair or deceptive acts or practices." (Civ. Code, § 1770, subd. (a); Stats. 1970, ch. 1550, § 1, p. 3157.) Those acts include many of the same types of conduct that the FAL and UCL forbid, such as "[m]isrepresenting the source . . . of goods or services"; "[d]isparaging the goods, services, or business of another by false or misleading representation of fact"; and "[m]aking false or misleading statements . . . concerning . . . price reductions." (Civ. Code, § 1770, subd. (a)(2), (8) & (13).) While several of the enumerated acts contain scienter requirements—for example, "[a]dvertising goods or services *with intent* not to sell them as

advertised" (§ 1770, subd. (a)(9), italics added)—most do not.[7] Unlike the FAL and UCL, the CLRA's remedies include actual and punitive damages. (Civ. Code, § 1780.) And though the CLRA does not itself authorize government enforcement actions, violations of the CLRA qualify as "unlawful . . . business act[s] or practice[s]" under the UCL, thereby providing a mechanism for government agencies to enforce the CLRA. (See, e.g., *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1234, 1236.)

STATEMENT OF THE CASE

In June 2011, plaintiff Vera Serova purchased *Michael*, an album released by Sony Music Entertainment about 18 months after Michael Jackson's 2009 death. (See *Serova v. Sony Music Entertainment* (2020) 44 Cal.App.5th 103, 111-112; CT 1:119-120 ¶¶ 26, 30 [first amended complaint].) Serova thereafter filed this putative class action in California superior court, alleging that Sony violated the UCL and CLRA by misrepresenting on the album cover and in advertisements that Michael Jackson performed all songs on the album. (*Serova*, *supra*, 44 Cal.App.5th at p. 112.) According to Serova's complaint, the lead singer on three of the songs was a "'soundalike' singer," not

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[7] The CLRA provides an affirmative defense, allowing a defendant to avoid liability if it "proves that [its] violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error." (Civ. Code, § 1784.) The defendant must also demonstrate that it has made "an appropriate correction, repair or replacement or other remedy of the goods and services." (*Ibid.*)

Michael Jackson. (*Ibid.*) Yet Sony represented on the back of the album cover, without qualification, that the album contained only "vocal tracks performed by Michael Jackson." (*Ibid.*) The cover (reprinted at OBM 13) included multiple depictions of Jackson. And Sony's advertising campaign promoted *Michael* as "'a brand new album from the greatest artist of all time.'" (*Serova*, *supra*, 44 Cal.App.5th at p. 112.)

Sony responded with a motion to strike under California's anti-SLAPP statute, contending "that Serova could not succeed on her claims . . . because [the] challenged statements about the identity of the lead singer on the Disputed Tracks were noncommercial speech as a matter of law," and for that reason, shielded by the First Amendment from liability under the UCL and CLRA. (*Serova*, *supra*, 44 Cal.App.5th at p. 113.) "To permit a ruling on the anti-SLAPP motion[] in advance of discovery, the parties stipulated that, 'solely for purposes of this determination on the Motions,' Michael Jackson did not sing the lead vocals on the three Disputed Tracks." (*Ibid.*)

The superior court denied Sony's motion. "Under prong one of the anti-SLAPP procedure," the court concluded that the anti-SLAPP statute applied because "all the statements addressed [in Serova's complaint] arose from conduct in furtherance of the defendants' right of free speech concerning an issue of public interest." (*Serova*, *supra*, 44 Cal.App.5th at p. 113.) But "[w]ith respect to prong two"—addressing whether Serova's UCL and CLRA claims were likely to succeed—the court determined that Sony's attribution of the songs to Jackson "on the Album Cover

and in the Promotional Video . . . constitut[ed] commercial speech." (*Id.* at p. 114.)[8]

The court of appeal disagreed—both in its original 2018 opinion and its opinion on remand from this Court's order transferring the case for reconsideration in light of *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, which clarified the scope of the anti-SLAPP statute.[9] The court of appeal held that, under the second prong of the anti-SLAPP analysis, Serova cannot show a probability of success on her UCL and CLRA claims because those statutes apply only to commercial speech, and Sony's speech was noncommercial. (See *Serova*, *supra*, 44 Cal.App.5th at pp. 126-132.) It acknowledged that "commercial speech that is false or misleading is not entitled to First Amendment protection and 'may be prohibited entirely.'" (*Id.* at p. 125, quoting *Kasky*, *supra*, 27 Cal.4th at p. 953.) But it treated Sony's attribution of the three disputed tracks to Jackson as "noncommercial" because Sony lacked "personal knowledge"

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[8] Serova's complaint also challenged claims about the authenticity of the three songs made in a statement released to the public by an attorney for Michael Jackson's estate, as well as claims on the *Oprah Winfrey* show made by Edward Cascio (the family friend of Jackson's who, according to Sony, recorded the songs at issue). (*Serova*, *supra*, 44 Cal.App.5th at pp. 111-112; see also CT 1:116 ¶ 11.) The superior court concluded that these claims did not qualify as commercial speech, and Serova did not appeal that ruling. (*Serova*, *supra*, 44 Cal.App.5th at p. 114 & fn. 5.)

[9] The 2018 opinion is reported at 26 Cal.App.5th 759, cause transferred Sept. 11, 2019, S251822.

whether Jackson was the vocalist. (*Id.* at p. 126.) The court explained that Sony did not itself record the tracks but instead purchased the songs from others. (See *id.* at pp. 126-128.) In addition, the court observed that Sony's "statements were directly connected to music that itself enjoy[s] full protection under the First Amendment," and that the statements concerned a matter of "public controversy." (*Id.* at pp. 126, 130). While recognizing that these factors were not "dispositive," the court determined that they were "appropriate to consider" alongside Sony's lack of personal knowledge in deciding whether Sony's statements were commercial or noncommercial. (*Id.* at p. 132; see also *id.* at p. 130.)

The court did not hold that it would violate the First Amendment to subject Sony to liability based on Serova's allegations. (See *Serova*, *supra*, 44 Cal.App.5th at p. 132.) Rather, it construed "California's consumer protection laws," including the UCL and CLRA, to "govern only *commercial* speech" and then deemed Sony's statements "noncommercial" based on what it viewed as serious First Amendment concerns in subjecting Sony to liability. (*Id.* at p. 124, original italics; see also *id.* at pp. 108, 124-132.)

This Court granted review.

ARGUMENT

The First Amendment does not protect false or misleading commercial speech, which "'may be prohibited entirely.'" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 953, quoting *In re R.M.J.* (1982) 455 U.S. 191, 203.) Here, Sony's descriptions of a product

it offered for sale to consumers—in particular, its statements on a product label and in an advertising campaign attributing all songs on the *Michael* album to Michael Jackson—constitute commercial speech. There is thus no constitutional problem in subjecting Sony's statements to liability under California's consumer protection statutes.

I. FALSE OR MISLEADING COMMERCIAL SPEECH RECEIVES NO FIRST AMENDMENT PROTECTION

Factually inaccurate or misleading expression—whether commercial or otherwise—is typically "valueless" and rarely "protected for its own sake" under the First Amendment. (*United States v. Alvarez* (2012) 567 U.S. 709, 718 (plur. opn. of Kennedy, J.).) In certain contexts, however, "the threat of [punishment] for making a false statement" can "inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." (*Id.* at p. 733 (opn. of Breyer, J., conc. in the judgment).) In those instances, the First Amendment imposes certain prophylactic rules to ensure that there is sufficient breathing space for "'uninhibited, robust, and wide-open' debate on public issues." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340.) For example, the First Amendment bars liability for making defamatory statements about a public figure unless the defendant acted with reckless disregard for the truth. (*N.Y. Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280; see also *Gertz*, *supra*, 418 U.S. at p. 347 & fn. 10 [similar for statements related to matter of public concern].)

But those limitations do not apply "in the commercial arena." (*Bates v. State Bar of Ariz.* (1977) 433 U.S. 350, 383.) Commercial speech—that is, advertising or other expression involving the marketing or sale of a commercial product or service, *post*, at pp. 33-38—is "unlikely to engender the beneficial public discourse that flows from political controversy." (*Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 496 (conc. opn. of Stevens, J.); see also *Kasky*, *supra*, 27 Cal.4th at pp. 953-954.) It is also a particularly "hardy breed of expression" unlikely to be chilled by "overbroad regulation." (*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Com. of N.Y.* (1980) 447 U.S. 557, 564, fn. 6.) Commercial speech is "the offspring of economic self-interest" (*ibid.*); a "seller has a strong financial incentive to educate the market and stimulate demand for his product or service" (*Edenfield v. Fane* (1993) 507 U.S. 761, 766).

More fundamentally, "'the elimination of false and deceptive [commercial speech] serves to *promote* the one facet'" of commercial speech that warrants First Amendment protection in the first place—"its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." (*Kasky*, *supra*, 27 Cal.4th at p. 954, italics added.) Before the 1970s, commercial speech "received no First Amendment protection" at all. (*Bolger v. Youngs Drug Prods. Corp.* (1983) 463 U.S. 60, 64, fn. 6.) But the U.S. Supreme Court revisited this rule in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, striking down a statute that "suppress[ed] the flow" of accurate,

truthful information to consumers (specifically, information about drug prices at pharmacies). (*Id.* at p. 770.) The Court has done the same in a number of subsequent cases, invalidating statutes and regulations "that seek to keep people in the dark for what the government perceives to be their own good." (*Sorrell v. IMS Health Inc.* (2011) 564 U.S. 552, 577.)[10] As the Court has explained, "'[p]eople will perceive their own best interests if only they are well enough informed, and [] the best means to that end is to open the channels of communication rather than to close them.'" (*Cent. Hudson*, *supra*, 447 U.S. at p. 562.) "[T]he First Amendment presumes that some accurate information is better than no information at all." (*Ibid.*)

But that presumption extends only to *accurate* information. False or misleading commercial information contributes just as much—if not more—to keeping consumers "in the dark" as the statutes that the high court has repeatedly struck down for restricting the flow of accurate information to consumers. Indeed, harms caused by false or misleading commercial expression can be "particularly severe: [i]nvestors may lose their savings, and consumers may purchase products that are more

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[10] See, e.g., *Sorrell*, *supra*, 564 U.S. at pp. 557, 576-577 [statute restricting dissemination of data on doctor prescribing practices]; *Rubin*, *supra*, 514 U.S. at pp. 483-484 [restrictions on disclosing alcoholic content on product labels or in advertising, aimed at preventing consumers from opting for the most potent alcoholic beverages]; *Cent. Hudson*, *supra*, 447 U.S. at pp. 568-572 [ban on advertising by electric utilities intended to decrease consumer demand for electricity].

dangerous than they believe or that do not work as advertised." (*Rubin*, *supra*, 514 U.S. at p. 496 (conc. opn. of Stevens, J.); see also *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 328 [similar].) Accordingly, there "can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." (*Cent. Hudson*, *supra*, 447 U.S. at p. 563.)

II. SEROVA ALLEGES CORE COMMERCIAL SPEECH UNPROTECTED BY THE FIRST AMENDMENT: THAT SONY FALSELY DESCRIBED ITS PRODUCT TO PURCHASERS

For purposes of evaluating Sony's anti-SLAPP motion, Sony has stipulated that Serova's allegations are true—that the *Michael* album cover and Sony's advertisements falsely stated that all songs were performed by Michael Jackson. As part of the anti-SLAPP analysis, a court must consider whether the plaintiff is likely to prevail. Here, the principal argument Sony has raised challenging Serova's likelihood of success is that the speech in question is noncommercial and thus subject to heightened First Amendment protections.[11] That argument fails: A seller's

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[11] The court of appeal held below, and both parties agree, that California's false advertising statutes apply only to expression that qualifies as "commercial speech" under the First Amendment. (See *ante*, at p. 28; OBM 44; ABM 35-36.) While no express language to that effect appears in the relevant statutory text, it is difficult to think of applications of the statutes that would not involve commercial speech, and such a limitation appears to be the norm among similar statutes across the country. (*Post*, at p. 34 & fn. 13.) Because the relevant statements here qualify as commercial, however, the Court need

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description of a product on a label or in an advertisement is a classic form of commercial speech. Thus, assuming Serova's allegations are true, application of California's false advertising statutes fully comports with the First Amendment.

A. A Seller's Description of Its Product on a Product Label, or in an Advertising Campaign, Constitutes Classic Commercial Speech

There is no "all-purpose test to distinguish commercial from noncommercial speech under the First Amendment." (*Kasky*, *supra*, 27 Cal.4th at p. 960.) It is a context-sensitive inquiry, rooted in "'common-sense' distinction[s]." (*Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 455-456.) But at its core, commercial speech is expression that "inform[s]" consumer purchasing decisions, providing "information as to who is producing and selling what product, for what reason, and at what price." (*Va. State Bd. of Pharmacy*, *supra*, 425 U.S. at p. 765.) Thus, in case after case, courts have treated a seller's "speech about a product" in an advertising campaign or on a product "label" as commercial speech. (*Kasky*, *supra*, 27 Cal.4th at pp. 960, 961; see also *id.* at p. 964.)[12]

(…continued)

not decide whether to read that limitation into California's statutes.

[12] See, e.g., *Kasky*, *supra*, 27 Cal.4th at p. 991 & fn. 7 (dis. opn. of Brown, J.) [collecting examples]; *Bolger*, *supra*, 463 U.S. at p. 68 [print advertisements describing manufacturer's

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Indeed, false advertising suits frequently concern product claims in advertisements or on labels—including claims describing the content of a product, or attesting to a product's authenticity. Because those suits generally arise under statutes limited to commercial speech, decisions upholding liability are typically predicated upon a determination that the speech at issue is commercial.[13] Such decisions have involved, for example, a "juice blend sold with a label that, in describing the contents, displays the words 'pomegranate blueberry,'" even though the "product contains but 0.3% pomegranate juice and 0.2% blueberry juice" (*POM Wonderful LLC v. Coca-Cola Co.* (2014) 573 U.S. 102, 105), "commercial announcements" by a seller advertising its dictionary as the "authentic Webster's," even though it had no connection to the original Webster's dictionary (*Guggenheimer v. Ginzburg* (N.Y. 1977) 372 N.E.2d 17, 18), labels falsely stating that products were "authentic Danish-made goods" (*Larsen v. Terk Techs. Corp.* (4th Cir. 1998) 151 F.3d 140, 142; see also *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1268 [similar]), and clothing "labeled as containing 70 percent

(…continued)

contraceptive products]; *Rubin*, *supra*, 514 U.S. at p. 481 [labels describing beer's alcohol content].

[13] The federal Lanham Act's false advertising prohibition, for example, applies only to "*commercial* advertising or promotion." (15 U.S.C. § 1125(a)(1)(B), italics added; see also, e.g., 3 Callman on Unfair Competition, Trademarks and Monopolies (4th ed.) § 11:12 [Uniform Deceptive Trade Practices Act, adopted in numerous States, "is only available against another's commercial speech"].)

wool, 20 percent nylon, and 10 percent cashmere," even though it had far less genuine cashmere (*Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.* (1st Cir. 2002) 284 F.3d 302, 306). The list goes on.[14]

The speech at issue here is not materially different. Serova seeks to hold Sony liable for falsely describing the content and authenticity of a product on the product's label, as well as in an advertising campaign promoting the product. Specifically, Serova alleges that the *Michael* album cover falsely reported to purchasers that all ten songs on the album were "performed by Michael Jackson" when, in fact, he performed only seven of them. (*Ante*, at pp. 25-26; see OBM 12-13.) And the advertising campaign promoting album sales suggested that *Michael* featured only Jackson performances, stating without

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[14] See, e.g., *Reid v. Johnson & Johnson* (9th Cir. 2015) 780 F.3d 952, 967 [butter substitute with a "label prominently stat[ing]"—falsely—that it "contains 'No Trans Fat'"]; *Price v. Philip Morris, Inc.* (Ill. 2005) 848 N.E.2d 1, 19 ["'light'" cigarettes that "did not carry any less tar or nicotine" than "'full-flavor'" ones]; *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.* (3d Cir. 2002) 290 F.3d 578, 589 [advertisements falsely describing antacid product as "'nighttime strength'"]; *Suchanek v. Sturm Foods, Inc.* (7th Cir. 2014) 764 F.3d 750, 762 [coffee-pod packaging misleadingly suggesting that pods contained fresh grounds, rather than instant-brew coffee]; *Davidson v. Kimberly-Clark Corp.* (9th Cir. 2018) 889 F.3d 956, 961 [label misleadingly suggesting that pre-moistened wipes were "flushable" when they were not suitable for being flushed down a toilet]; *Bakers Franchise Corp. v. FTC* (3d Cir. 1962) 302 F.2d 258, 259 [advertisements for "'Lite Diet'" bread suggesting it was a "low calorie food" when, in fact, the manufacturer merely cut the slices more thinly].

qualification that it was a "brand new album from the greatest artist of all time." (*Ante*, at p. 26.) Such claims, which have the potential to "deceive[]" a consumer into "making a purchase," are classic forms of commercial speech properly subject to false advertising scrutiny. (*Kwikset*, *supra*, 51 Cal.4th at p. 329.)

Sony contends, to the contrary, that its statements do not qualify as commercial speech because they do "more than simply propose a commercial transaction." (ABM 41.) Sony relies on statements made by the U.S. Supreme Court that "core" commercial speech is "speech which does 'no more than propose a commercial transaction.'" (*Bolger*, *supra*, 463 U.S. at p. 66, quoting *Va. State Bd. of Pharmacy*, *supra*, 425 U.S. at p. 762.) By that, however, all the Court meant was that "commercial advertisement[s]" or other forms of marketing—that is, speech proposing a commercial transaction by describing "who is producing and selling what product, for what reason, and at what price"—qualify as core commercial speech. (*Va. State Bd. of Pharmacy*, *supra*, 425 U.S. at pp. 762, 765; see *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985) 471 U.S. 626, 637.) That definition applies to Sony's statements here, one of which was featured in an advertising campaign and one of which was affixed to a product label—which, just like an advertisement, is "part of a firm's marketing . . . to the consumer." (*Adolph Coors Co. v. Brady* (10th Cir. 1991) 944 F.2d 1543, 1546; see also *Kwikset*, *supra*, 51 Cal.4th at pp. 329, 333 [similar]; *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.* (2d Cir. 1998) 134 F.3d 87, 97 ["labels are a form of advertising"].)

In any event, "commercial speech is not limited to" expression proposing a commercial transaction. (*Kasky*, *supra*, 27 Cal.4th at p. 956; see also *Bolger*, *supra*, 463 U.S. at pp. 66-67; Stern, *In Defense of the Imprecise Definition of Commercial Speech* (1999) 58 Md. L.Rev. 55, 80.) Without purporting to "adopt[] an all-purpose test to distinguish commercial from noncommercial speech," this Court has explained that, as a general matter, commercial speech includes statements made by "someone engaged in commerce" about "the business operations, products, or services of the speaker" (*Kasky*, *supra*, 27 Cal.4th at pp. 960-961), where the "intended audience" is "actual or potential buyers or customers of the speaker's goods or services" (*id.* at p. 960). That standard is plainly satisfied here: to induce consumers to buy *Michael*, Sony told would-be purchasers that Jackson performed all of the album's songs.

Sony also suggests that the analysis should be different for claims made about products from the music and entertainment industry, asserting that Serova "does not identify a single case where a statement linking an artist to an artistic work was treated as commercial speech." (ABM 43.) But there is no shortage of such cases: for example, in *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.* (2d Cir. 1987) 818 F.2d 266, 271, the court treated "labeling [on] album covers" as commercial speech properly subject to false advertising scrutiny where the labels said that the albums "contain[ed] . . . performances of Jimi

Hendrix, when in fact they did not."[15] Such cases arise in other entertainment and artistic mediums as well.[16] Thus, when the music industry sells an album—no less than when the film industry markets a blockbuster, the pharmaceutical industry markets a drug, or the food and beverage industry markets a cereal or soda—product-focused claims to consumers constitute commercial speech. "The purchaser of a book [or an album], like the purchaser of a can of peas, has a right not to be misled as to the source of the product." (*Rogers v. Grimaldi* (2d Cir. 1989) 875 F.2d 994, 997.)

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[15] See also *RCA Records, a Div. of RCA Corp. v. Kory Records, Inc.* (E.D.N.Y., Mar. 14, 1978, No. 77-C-362) 1978 WL 21424, at *1 [representations on "album covers and . . . advertisements" falsely stating "that certain recordings incorporated performances in which Glenn Miller personally participated"]; *Benson v. Paul Winley Record Sales Corp.* (S.D.N.Y. 1978) 452 F.Supp. 516, 518 ["prominent use of [George] Benson's name and picture on the album and in the advertisements," creating "the false impression that Benson was responsible for the contents of the album"].

[16] See, e.g., *King v. Innovation Books, a Div. of Innovative Corp.* (2d Cir. 1992) 976 F.2d 824, 826 [movie promotional campaign misleadingly suggesting Stephen King had a significant role in adapting the film]; *Smith v. Montoro* (9th Cir. 1981) 648 F.2d 602, 606-607 [film credits and advertisements featured the wrong actor]; *Wildlife Internationale, Inc. v. Clements* (S.D. Ohio 1984) 591 F.Supp. 1542, 1548 & fn. 14 [fine-art prints misleadingly suggesting the original artist approved of their quality and that they were consistent with his "current artistic standards"].

B. A Seller's False or Misleading Product Claims Do Not Become "Noncommercial" Merely Because the Seller Lacks Personal Knowledge Whether the Statements Are True

The court of appeal agreed that advertising or product labeling is "not necessarily excluded from the category of commercial speech" solely "because it promotes a product that is itself subject to full First Amendment protection"—such as music or other forms of artistic expression. (*Serova*, 44 Cal.App.5th, at p. 131.) But it nonetheless concluded that Sony's statements were "noncommercial" because Sony had "no personal knowledge of the artist's identity." (*Ibid.*) Sony, the court emphasized, had no role in "creat[ing], produc[ing], [or] record[ing]" the three disputed tracks. (*Id.* at p. 127.) Rather, Sony "only" purchased the recordings from others, included them on the *Michael* album, and marketed them to consumers as songs performed by Michael Jackson. (*Id.* at p. 128.) According to the court, "absence of the element of personal knowledge is highly significant" to the question whether speech is commercial or noncommercial under this Court's decision in *Kasky*. (*Ibid.*)

The court of appeal misread *Kasky*. Nothing in that opinion suggests that a seller's personal knowledge is relevant to the question whether a product description printed on a product label or contained in an advertisement qualifies as commercial speech. Indeed, the principal innovation of modern false advertising statutes was to *eliminate* common law scienter requirements, which frustrated consumers' ability to hold sellers liable for making deceptive commercial claims. (*Ante*, at pp. 19-22.) And

as discussed above, *Kasky* reaffirmed that "speech about a product" in an "advertisement" or on a product "label" qualifies as commercial speech. (*Supra*, 27 Cal.4th at pp. 960-961, citing *Rubin*, *supra*, 514 U.S. 476 and *Va. State Bd. of Pharmacy*, *supra*, 425 U.S. 748.)

Kasky involved a very different question: whether claims that Nike made about labor practices in its foreign shoe-production factories qualified as commercial speech when the claims appeared in "press releases and letters to newspaper editors." (*Supra*, 27 Cal.4th at p. 963.) Nike undertook this "public relations campaign" to reassure troubled consumers that the company was not relying on sweatshop labor. (*Id.* at p. 962.) While the Court appeared to acknowledge that press releases and op-eds are not ordinary mediums for commercial speech (see *id.* at pp. 961-962, 964), it nonetheless held that Nike's statements qualified as commercial because, like advertisements, they were designed "to promote and defend [Nike's] sales and profits" (*id.* at p. 946; see also *id.* at p. 963).

The Court also observed that Nike's statements concerned the company's "own business operations" (*Kasky*, *supra*, 27 Cal.4th at p. 964)—that is, they "describe[d] matters within the personal knowledge of the speaker" (*id.* at p. 962). The Court explained that, for this reason, Nike's statements were "more easily verifiable" than speech about another company's labor practices and thus "less likely . . . to be chilled by proper regulation." (*Id.* at p. 962; see also *id.* at p. 963.)

Kasky thus pointed to Nike's "personal knowledge" as one of multiple factors that justified *expanding* the commercial speech doctrine beyond classic forms of marketing to cover forms of expression—statements to the media and op-ed pieces—that are not traditionally considered to be commercial speech. Here, however, the court of appeal took that factor out of context and cited it as a reason *to contract* the definition of what has always been treated as commercial speech—product descriptions on labels and in advertisements—because Sony purportedly lacked actual knowledge about the truth of its statements. *Kasky* provides no support for that reasoning, which cannot be reconciled with the well-established consensus, discussed *ante*, at pp. 33-38, that sellers engage in commercial speech when they describe their products to consumers in advertisements and on labels.[17]

The court of appeal's demand for a showing of "personal knowledge" could, if taken at face value, have broad, destabilizing consequences for well-established false advertising principles. Sellers often sell products produced or manufactured by another: For example, just as Sony bought audio tracks recorded by others

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[17] *Kasky*'s application of commercial speech doctrine generated considerable controversy. (See, e.g., *Nike, Inc. v. Kasky* (2003) 539 U.S. 654, 677 (opn. of Breyer, J., dis. from dismissal of case as improvidently granted).) The Court need not wade into that controversy here. While the Attorney General believes *Kasky* was rightly decided, this case provides no occasion to broadly reaffirm all of *Kasky*'s reasoning because Sony's statements fall well within the established core of commercial speech doctrine.

in order to disseminate them to consumers for profit, grocery stores and other retailers routinely purchase products from others to sell to consumers. (See, e.g., *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1082-1083 [grocery-store chains that allegedly made misleading statements to consumers about color additives in salmon raised by "fish farmers"].) And manufacturers often purchase component parts from other companies before assembling them and marketing the final product to consumers. (See generally *Impression Prods., Inc. v. Lexmark Intern. Inc.* (2017) 137 S.Ct. 1523, 1532 [discussing, for example, "'[a] generic smartphone assembled from various high-tech components'"].) It would create a massive loophole in false advertising law if these consumer-facing businesses were effectively insulated from liability for making false or misleading claims to consumers merely because they did not directly participate in, and thus purportedly lacked "personal knowledge" of, the production process.[18]

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[18] Sony claims that the court of appeal's approach to commercial speech analysis would not "insulate sellers from liability" because "[d]etermining that [speech is] noncommercial speech does not mean that *no* liability can ever be imposed." (ABM 47.) But as Sony acknowledges (*id.* at pp. 14, 35-36), false advertising statutes often apply only to commercial speech (see, e.g., *ante*, at p. 34, fn. 13). And the First Amendment imposes heightened restrictions on the government's ability to punish noncommercial falsehoods. (*Ante*, at p. 29; see Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine* (2007) 41 Loy. L.A. L.Rev. 227, 228 ["We cannot have much consumer protection

(continued…)

Such a "personal knowledge" requirement could also undermine longstanding rules that sellers must substantiate advertising claims. (See, e.g., Bus. & Prof. Code, § 17508; FTC, *FTC Policy Statement Regarding Advertising Substantiation* (Nov. 23, 1984) <https://tinyurl.com/y3y97xoo> [as of Jan. 25, 2021].) Where sellers suggest to consumers they have a reasonable evidentiary basis for their product claims, but in fact have no such evidence, they engage in deceptive marketing that may be punished under false advertising statutes. (See, e.g., *FTC v. Direct Mktg. Concepts, Inc.* (1st Cir. 2010) 624 F.3d 1, 10-11 [unsubstantiated claim that calcium supplements could cure cancer]; *State ex rel. Miller v. Hydro Mag, Ltd.* (Iowa 1989) 436 N.W.2d 617, 618, 622 [unsubstantiated claim that water treatment system prevented rust].) It would make no sense to allow such sellers to defend themselves by arguing they lacked "personal knowledge" whether their claims were true. The whole point of this branch of false advertising law is to require sellers to investigate and substantiate their claims before making them to consumers.

Nor can the court of appeal's "personal knowledge" standard be reconciled with another common form of false advertising claims: those brought by businesses injured by false or misleading allegations made by their competitors. Businesses

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(…continued)

law in a world that treats commercial speech like political speech"].)

often make claims about their competitors' production methods or processes—claims that they may not be in a position to definitively verify.[19] For example, "[e]arly in 2019 Anheuser-Busch began to advertise that . . . Miller Lite and Coors Light use corn syrup" when making their beer. (*Molson Coors Beverage Co. USA v. Anheuser-Busch Cos.* (7th Cir. 2020) 957 F.3d 837, 838.) The parties, courts, and commentators debated whether that claim was misleading because, even if literally true, it falsely suggested to purchasers that Miller and Coors use high fructose corn syrup, rather than simple corn syrup, and that the syrup "makes it into the beer," rather than fermenting entirely into alcohol. (*Id.* at p. 839.)[20] If the court of appeal's "personal knowledge" standard here were adopted, however, Anheuser-Busch could simply run an advertising campaign baldly asserting that Miller and Coors used high fructose corn syrup, and it would be insulated from liability on the grounds that the company did not know with any certainty exactly what Miller and Coors put in

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[19] See, e.g., *Pizza Hut, Inc. v. Papa John's Intern., Inc.* (5th Cir. 2000) 227 F.3d 489, 501. See generally Goldman, *The World's Best Article on Competitor Suits for False Advertising* (1993) 45 Fla. L.Rev. 487, 504.

[20] Compare *Molson Coors*, *supra*, 957 F.3d at p. 839 [not misleading] with *MillerCoors, LLC v. Anheuser-Busch Cos.* (W.D. Wis. 2019) 385 F.Supp.3d 730, 751 [potentially misleading] and Tushnet, *Major Beer Battle Turns on Mead (Johnson)*, Rebecca Tushnet's 43(B)log (May 31, 2019) <https://tushnet.blogspot.com/2019/05/> (as of Jan. 25, 2021) [similar].

their products.[21] The Court should reject that unprecedented gloss on commercial speech doctrine.

C. It Would Not Violate the First Amendment to Hold Sony Liable for Falsely Describing Its Product to Consumers

The court of appeal's strained commercial speech analysis was influenced by its fear that holding Sony liable for false advertising in this case would have troubling "First Amendment implications." (*Serova*, *supra*, 44 Cal.App.5th at p. 129.) Sony goes further, arguing that it would *actually violate* the First Amendment to subject it to liability on the facts alleged in Serova's complaint. (See, e.g., ABM 49.) That is incorrect: subjecting Sony's commercial speech to false advertising liability would pose no serious First Amendment concerns, much less violate the First Amendment.

1. The First Amendment does not provide a "due diligence" safe harbor for false advertising

Sony first contends that it did all that it could to verify the accuracy of its statements to consumers that Michael Jackson performed the songs in question. According to Sony, its representations thus amounted, at most, to a "good-faith,"

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[21] Cf. O'Reilly, *'Misleading' Tesco Horse Meat Ad Banned*, Marketing Week (Sept. 4, 2013) <https://www.marketingweek.com/misleading-tesco-horse-meat-ad-banned/> (as of Jan. 25, 2021) [discussing advertisement falsely implying that "all retailers and suppliers"—the "entire food industry"—were "likely to have sold products contaminated with horse meat"].

"innocent" mistake (ABM 43, 52), and the First Amendment entitles it to "breathing room" to make such mistakes without fear of "strict liability" under the CLRA and UCL (*id.* at p. 52; see also *Serova*, *supra*, 44 Cal.App.5th at pp. 129-130 [similar]).

Sony is mistaken. Even if it is true that Sony performed all investigation that was reasonably possible to verify the songs' performer—and Serova contests that factual assertion (see RBM 25-26 & fn. 3)—that would provide no safe harbor to Sony under the First Amendment. As this Court recognized in *Kasky*, and as other courts have repeatedly held, false and misleading advertising may be prohibited on a strict liability basis. (See *supra*, 27 Cal.4th at pp. 951, 953-954; see also, e.g., *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.* (3d Cir. 1990) 898 F.2d 914, 922, 937; *Procter & Gamble Co. v. Amway Corp.* (5th Cir. 2001) 242 F.3d 539, 547, 559.) Even the dissent in *Kasky* agreed that, as a general matter, "States may . . . adopt a strict liability standard for false and misleading [commercial] representations." (27 Cal.4th at p. 996, fn. 8 (dis. opn. of Brown, J.).)

That makes good sense. Strict liability regimes have tremendous deterrence value, encouraging businesses to take all reasonable precautions to avoid inflicting harm on others. (See generally *Escola v. Coca Cola Bottling Co. of Fresno* (1944) 24 Cal.2d 453, 462-463 (conc. opn. of Traynor, J.).) Such precautions are particularly appropriate in the false advertising context, where the threatened harm to consumers is substantial. As discussed above (*ante*, at pp. 31-32), the "evils of false commercial

speech" can be "particularly severe." (*Rubin*, *supra*, 514 U.S. at p. 496 (conc. opn. of Stevens, J.).) Or as one scholar put it, "we abandoned caveat emptor for good reasons." (Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine* (2007) 41 Loy. L.A. L.Rev. 227, 253; see *ante*, at pp. 18-22.)[22]

Strict liability also helps to ensure that injured purchasers are justly compensated. It would be "inequitable to allow the person who made the misrepresentation (however innocently) to retain the benefit of a bargain induced by her own misrepresentation." (Pridgen & Alderman, Consumer Protection and the Law (2020-2021 ed.) § 2:7.) And strict liability allows a consumer to recover her losses with relative ease and efficiency, needing to prove "*only* . . . that 'members of the public [were] likely to be deceived'" by the seller's false or misleading claim—in other words, that the claim was objectively false or misleading,

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[22] Granted, in this case, if Serova is correct that the songs were not performed by Michael Jackson, perhaps the only direct harm is the out-of-pocket cost of the album. But statutes prohibiting false or misleading product claims exist to protect not only individual purchasers' pocketbooks, but also public health and safety, as well as the integrity of the marketplace more generally. (See *ante*, at pp. 18-25.) Sony's legal arguments, if accepted, would undermine these broader aims. (Cf. *Kwikset*, *supra*, 51 Cal.4th at p. 331 [UCL and FAL prohibit "label misrepresentations" because they "impair the ability of consumers to rely on labels, place those businesses that do not engage in misrepresentations at a competitive disadvantage, and encourage the marketplace to dispense with accuracy in favor of deceit"].

not that the seller knew or should have known it was false or misleading. (*Kasky*, *supra*, 27 Cal.4th at p. 951, italics added; see also 5 McCarthy on Trademarks and Unfair Competition (5th ed.) §§ 27:51, 27:55 [similar under federal Lanham Act's false advertising regime].) In that way, injured consumers (or the government acting to protect such consumers) are not burdened with the obligation of ascertaining, through discovery or other means, what due diligence a seller undertook before making its false or misleading claims. (Cf. *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266-1267 ["In drafting the [UCL], the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity"].)

Of course, reasonable minds can differ on these policy goals and whether they are best served by strict liability in the false advertising context. For example, some scholars argue that courts have erred in construing the federal Lanham Act's false advertising provision to impose strict liability because "it creates the potential of penalizing well-intentioned advertisers."[23] And legislatures, including in California, have sometimes deviated from strict liability—either by imposing a higher mens rea requirement (such as negligence in the case of the FAL and similar statutes in other States, *ante*, at p. 23) or by providing a safe harbor or affirmative defense for good-faith mistakes by

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[23] Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act* (1999) 79 B.U. L.Rev. 807, 840. Compare, e.g., Tushnet, *supra*, 41 Loy. L.A. L.Rev. at pp. 251-254 [defending a strict liability approach to false advertising].

sellers (such as the CLRA's bona fide error defense, *ante*, at p. 25, fn. 7).

The critical point here, however, is that this question is one of *policy*—one calling for a legislative judgment—rather than one to which the First Amendment dictates an answer. In arguing otherwise, Sony relies entirely on First Amendment cases from outside the commercial speech context—cases like *Sullivan*, *supra*, 376 U.S. 254, and *Gertz*, *supra*, 418 U.S. 323, which involved prophylactic limits on defamation claims necessary to ensure breathing room for "'uninhibited, robust, and wide-open' debate on public issues." (*Gertz*, *supra*, 418 U.S. at p. 340; see ABM 43, 54.) In the noncommercial speech context, such limits mean that speakers may sometimes err, overstate, or even actively mislead as they engage in public discourse and debate. For good reason, however, California and the rest of the country have abandoned "uninhibited" commercial markets "wide open" to false and misleading claims. (See *ante*, at pp. 18-25; *Kasky*, *supra*, 27 Cal.4th at p. 953.) The era of caveat emptor is over.

2. Sony's statements are not so "unverifiable" that they cannot be subject to false advertising liability

Sony also contends that the First Amendment shields it from false advertising liability because the true vocal artist featured on the disputed tracks is not "an objectively verifiable fact." (ABM 46.) According to Sony, this follows "[b]ecause Michael Jackson . . . died," meaning that Sony could, at best, "only draw a conclusion based on third party interviews and expert opinions." (*Ibid.*)

But this argument is inconsistent with the stipulation that Sony has entered into to allow for pre-discovery resolution of its anti-SLAPP motion: Sony stipulated that its representations about the authenticity of the songs in question were false—meaning provably, verifiably false. (See *ante*, at p. 26.)

In any case, the true performer on the *Michael* tracks is just as "verifiable" as numerous other factual contentions routinely examined in legal actions. Judges and juries often resolve factual disputes where there is no definitive, smoking gun evidence: for example, who committed a murder in a case where "[t]here were no eyewitnesses" and all "evidence was circumstantial" (*People v. Sommerhalder* (1973) 9 Cal.3d 290, 294), or who or what caused any number of actionable harms, from a wildfire to a car accident to medical malpractice (see, e.g., *People v. S. Pac. Co.* (1983) 139 Cal.App.3d 627, 638-639; see also Roesler, *Evaluating Corporate Speech About Science* (2018) 106 Geo. L.J. 447, 478 [noting that "juries frequently consider competing evidence regarding scientific claims"]). Just as in those cases, Sony can present its evidence (including its "third party interviews and expert opinions" (ABM 46)), Serova can present her competing evidence (see OBM 14), and a judge or jury can decide who should prevail based on the relevant burdens and standards of proof.

Sony appears to find this possibility troubling because, it suggests, the authenticity of the album tracks is ultimately unknowable—that is, not reasonably subject to proof either way. (See ABM 45-46 [contrasting the factual dispute here with the "verifiable alcohol content on beer label" or verifiable "investment

returns"].) That seems unlikely. As Sony acknowledges, "professional forensic musicologists" can analyze the tracks (*id.* at p. 46), and that is just one of several forms of proof available to test Serova's factual allegations (see *ibid.*; see also CT 1:120-122). But even if that were not the case, and the authenticity of the recordings is truly an unsolvable mystery, that would simply mean Serova would fail to meet her burden of proving that Sony's representations *were false*. There is no need for the First Amendment to police false advertising actions in the way Sony suggests when ordinary principles governing burdens of proof will do. (See, e.g., *Eastman Chem. Co. v. Plastipure, Inc.* (5th Cir. 2014) 775 F.3d 230, 238-239 ["A reasonable jury could have concluded that [a seller's] statements were false," even where the jury had to "weigh the credibility of the competing experts"]; see also *id.* at p. 236 [similar].)[24]

[24] Ordinary evidentiary rules are also the answer to Sony's suggestion that Serova's allegations, if accepted, would open the door to false advertising claims based upon attributions that have long been accepted by experts and the public—for example, that "William Shakespeare wrote the works attributed to him." (ABM 51 & fn. 8.) Given the centuries-old practice of attributing those works to Shakespeare, it is highly improbable that any judge or jury could reasonably conclude that a plaintiff met his or her burden of proving that Shakespeare did not write *Hamlet*, *Othello*, or *Romeo and Juliet*.

3. Holding Sony liable on false advertising grounds would neither chill nor punish artistic expression

Sony further argues that false advertising liability would punish or chill its choice of album cover art, selection of the album's title, or the decision to release the music itself. (See ABM 40-44, 49-54, 56-60.) The court of appeal similarly emphasized that the "music on the album itself is entitled to full protection under the First Amendment," making it "appropriate to take account of the First Amendment significance of the work itself in assessing" the permissibility of false advertising liability. (*Serova*, *supra*, 44 Cal.App.5th at pp. 130-131.)

These contentions fail. Application of ordinary false advertising principles in this case would in no way punish or chill artistic expression. Serova seeks to hold Sony liable for falsely describing the content of the *Michael* album to consumers, *not* for "includ[ing] iconic images of Jackson" or "artistic renderings of his face" on the album cover (ABM 40), or for "selecting" which songs would be included on the album (*id.* at p. 52). Sony was entirely free to choose the content of the album and its cover. It merely had to ensure that it did so in a way that did not falsely represent to purchasers that Jackson performed all of the album's songs.

Sony is therefore incorrect in arguing that its representations to consumers about the *Michael* album were "'inextricably intertwined'" with artistic expression. (ABM 56.) Commercial speech is only "inextricably intertwined" with noncommercial expression—and accordingly subject to

heightened First Amendment protections—where it would be impossible to punish the commercial speech without "prevent[ing] the speaker from conveying . . . noncommercial messages." (*Bd. of Trustees of State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 474.) In *Board of Trustees*, the high court considered a university regulation barring students from hosting "Tupperware parties," where students discussed "home economics" and invited commercial salespersons on campus to sell them "housewares." (*Id.* at pp. 473-474.) While the "home economics" portion of the parties involved noncommercial speech, that expression was not "inextricably intertwined" with the commercial portion—selling housewares—because "[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares." (*Id.* at p. 474.) So too here: "[n]o law of man or of nature makes it impossible to sell" music without describing that music inaccurately.

Sony is also wrong in asserting that false advertising liability would unduly constrain its "creative choice" to title the album in a way that "impart[s] subjective meaning" to the album's tracks. (ABM 41.) Sony could have chosen any title it wanted— from *Thriller II* to *King of Pop* to the actual album title here, *Michael*—so long as it did not falsely attribute all of the album's songs to Michael Jackson. Thus, assuming Sony's attribution was false, all Sony likely needed to do to avoid false advertising liability was "provide disclaimers about the singer's identity in its marketing materials" (*Serova*, *supra*, 44

Cal.App.5th at p. 129), or otherwise make clear "that its attribution of the Cascio recordings to Jackson was a belief"—or even a well-informed opinion—"and not a fact" (OBM 52-53).[25]

In the court of appeal's view, requiring Sony to add disclaimers or otherwise clarify its marketing of the album would have "chill[ed]" artistic expression by "compelling" Sony "to present views in [its] marketing materials with which [it] do[es] not agree." (*Serova*, *supra*, 44 Cal.App.5th at pp. 129-130.) Sony's brief echoes this contention, suggesting that the threat of false advertising liability presents Sony with the "Hobson's Choice" of either "not including the tracks on *Michael*" or "stating on the album that the Cascio Recordings 'might not be' Jackson's

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[25] To be clear, in some cases, disclaimers may not be sufficient to clarify a false or misleading product or brand name. That is especially true when the disclaimer appears in "miniscule" fine print on a product's packaging. (*Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, 1159 [fine print telling purchasers to take "two" vitamins a day was insufficient to render the product's brand name—"ONE A DAY"—non-misleading]; see also, e.g., *Williams v. Gerber Prods. Co.* (9th Cir. 2008) 552 F.3d 934, 939 [similar].) Opinion statements, moreover, are not insulated from false advertising liability. They sometimes contain "embedded statements of fact" or "'omit[ ] to state facts necessary' to make [the] opinion . . . 'not misleading.'" (*Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund* (2015) 575 U.S. 175, 185, 186; see, e.g., *PhotoMedex, Inc. v. Irwin* (9th Cir. 2010) 601 F.3d 919, 931.) The Court should make clear that Sony's marketing and packaging, like that of all other commercial sellers, must comply with these basic principles.

vocals, thereby submitting to forced speech contrary to its own conclusions and those of its experts." (ABM 49.)

That argument is deeply misguided. Sony provides no reason to think sellers will refrain entirely from releasing music or other forms of entertainment—and missing out on the potential profits of doing so—merely to avoid providing accurate, non-misleading information to purchasers. In fact, sellers need not append any disclaimers to their product claims, or otherwise edit those claims in any way, if they have conducted careful due diligence and are confident in the accuracy of their claims. True, if their claims are later proven false or misleading, sellers can be held liable under false advertising regimes that authorize strict liability. (See *ante*, at pp. 24-25, 47.) But where a seller is confident in the results of a thorough investigation, as Sony claims to be here (see ABM 48), the remote threat of later being proven wrong and held liable will not be so "chilling" as to deter a seller from releasing a commercial product.

The court of appeal also invoked compelled speech doctrine (see *Serova*, 44 Cal.App.5th at pp. 129-130), comparing this case to one in which the government "compel[s] individuals to speak a particular message" (*Nat. Inst. of Family & Life Advocates v. Becerra* (2018) 138 S.Ct. 2361, 2371). In *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 642, for example, the high court struck down a statute threatening schoolchildren with expulsion for refusing to recite the Pledge of Allegiance and salute the flag. The court of appeal viewed this case as similar because false advertising liability would

"regulat[e] the expression" of Sony's marketing, potentially requiring it to acknowledge "the existence of real controversy or doubt about the identity of the singer even though [Sony] might not believe that any reasonable doubt exists." (*Serova*, *supra*, 44 Cal.App.5th at p. 130 & fn. 16.)

That analogy is flawed. False advertising statutes do not compel any particular speech; they merely provide that where a seller describes a product to consumers, it must do so accurately. In some instances, of course, the application of false advertising statutes may require a seller to say more, or do more, in its marketing materials than it might if its only consideration were maximizing sales or profits. But that is simply part and parcel of protecting the interest of consumers in being well informed about commercial products: as this and other courts have repeatedly recognized, the government "may require a commercial message to 'appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.'" (*Kasky*, *supra*, 27 Cal.4th at p. 954, quoting *Va. State Bd. of Pharmacy*, *supra*, 425 U.S. at p. 772, fn. 24.) The First Amendment "does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." (*Ibid.*, quoting *Va. State Bd. of Pharmacy*, *supra*, 425 U.S. at pp. 771-772.)

If the court of appeal were right that statutes unconstitutionally "compel" speech by "regulating . . . expression" (*Serova*, *supra*, 44 Cal.App.5th at p. 130), virtually any legitimate restriction on expression could be reframed as an order

compelling speech. For example, the high court has held that a State may "proscribe advocacy" that "is directed to inciting or producing imminent lawless action." (*Brandenburg v. Ohio* (1969) 395 U.S. 444, 447.) Such laws do not unconstitutionally compel expression merely because they may require advocates to edit their speeches to avoid inciting imminent violence. Another "historic and traditional" restriction on expression is a state or federal prohibition on "fraud." (*United States v. Stevens* (2010) 559 U.S. 460, 468.) Anti-fraud statutes do not unconstitutionally compel speech by requiring sellers to describe their products or services in ways that avoid defrauding customers. While there are "few" instances where the State may permissibly restrict expression because of its content (*ibid.*), where such legitimate restrictions exist, they cannot be reimagined as orders compelling speech and invalidated on that basis.

Finally, Sony contends that the Court should limit the scope of false advertising liability in the context of "artistic works" because "[u]ncertainty over credit and attribution for expressive works is common." (ABM 49-50; see also *ibid.* [noting that there is "routinely litigation over who is owed attribution for expressive works"].) Sony fails to explain, however, how this Court may properly evaluate that empirical assertion. Sony cites nothing demonstrating that artistic attribution is more commonly contested than a host of other commercial product claims legitimately subject to false advertising liability—including claims about the efficacy or safety of prescription drugs and nutritional supplements (see, e.g., *Consumer Justice Ctr. v.*

Olympian Labs, Inc. (2002) 99 Cal.App.4th 1056, 1058; *Abbott Labs. v. Mead Johnson & Co.* (7th Cir. 1992) 971 F.2d 6, 15); the health benefits of various food and beverage products (see, e.g., *POM Wonderful, LLC v. FTC* (D.C. Cir. 2015) 777 F.3d 478, 484-488; FTC, Press Statement, *Dannon Agrees to Drop Exaggerated Health Claims for Activia Yogurt and DanActive Dairy Drink* (Dec. 15, 2010) <https://tinyurl.com/y9mywwgg> [as of Jan. 25, 2021]); or the promised performance of an automobile, a kitchen appliance, a smartphone, or myriad other products (see, e.g., *Van Zant v. Apple Inc.* (2019) 229 Cal.App.4th 965, 967; Bloomberg News, *Hyundai Settles Horsepower Suit*, N.Y. Times (June 22, 2004) <https://tinyurl.com/y8z5v7b8> [as of Jan. 25, 2021]).

And to the extent Sony is correct in suggesting the entertainment industry is rife with misattributions, *less* consumer protection oversight is not the answer. Greater false advertising scrutiny would provide the appropriate incentives for sellers "to make only accurate attributions" (ABM 50) or to be more transparent that an attribution is based on research or expert opinion (and thus may be open to debate) (see *ante*, at pp. 53-55).

4. False advertising is not insulated from liability because it relates to a matter of public interest

In addition to emphasizing that Sony allegedly lacked personal knowledge (*ante*, at pp. 39-45), and that its product was a form of artistic expression (*ante*, at pp. 52-57), the court of appeal suggested that it would present First Amendment concerns to impose false advertising liability for making claims

that relate to "an issue of public interest and debate" (*Serova*, *supra*, 44 Cal.App.5th at p. 127). Here, the court explained, Sony's alleged misrepresentations related to the "public controversy" about "whether the three Songs on the Disputed Tracks should be included in Michael Jackson's body of work." (*Id.* at p. 127; see also ABM 54-55 [similar].)

As the high court has explained, however, commercial speech is not entitled to heightened First Amendment protections merely because it "contain[s] discussions of important public issues" or "'links a product to a current public debate.'" (*Bolger*, *supra*, 463 U.S. at pp. 67-68; see *Kasky*, *supra*, 27 Cal.4th at pp. 957-958 [similar].) And here, Sony's statements did not even go that far. Sony made no effort on the product label, or in its advertisements, to explain to consumers *why* it concluded, after investigation, that Jackson performed the songs. It simply asserted that Jackson was the vocalist—an assertion that the parties have assumed to be false at this stage of the litigation. (See *ante*, at p. 26.) False statements made by a seller about its product cannot qualify as a "discussion[]" of important public issues or make an appreciable contribution to "public debate." No one could reasonably claim, for example, that a meat producer contributes to a public debate over food safety by falsely representing on a product label that the meat has been inspected for salmonella when, in fact, it has not been—any more than a manufacturer would contribute to public debates about

protectionism or labor standards by falsely claiming that its products were "made in the U.S.A."[26]

It would seriously frustrate the State's interest in combatting false or misleading advertising to immunize a seller from liability merely because its claims bear some relation to a matter of public interest or a public figure. There are few topics that cannot be said to bear that relation: Under First Amendment principles that apply in the noncommercial speech context, a "matter of public concern" is a broad term, including anything that "can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" (*Snyder v. Phelps* (2011) 562 U.S. 443, 453.) Similarly, the term "public figure" covers "[e]veryone the reader has heard of before and a great many people he hasn't." (Kagan, *A Libel Story:* Sullivan *Then and Now* (1993) 18 Law & Soc. Inquiry 197, 209-210.)

Moreover, it is not uncommon for advertisers to draw on matters of public interest and debate when marketing their products to potential purchasers. Today, for example, numerous sellers reference climate change or other "green" attributes of their products to exploit consumer concerns about the

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[26] Had Sony genuinely contributed to the public's understanding of a public controversy—for example, by disclosing information on the album cover about the controversy and Sony's investigative steps to confirm the songs' authenticity—it is highly unlikely that Sony would be subject to liability. Statements that truly contribute to a matter of public discourse are unlikely to be false or misleading *for the very reason* that they provide the public with truthful information that aids their understanding of a public issue.

environment—sometimes making "specious claims" or engaging in "ecological puffery about products with minimal environmental attributes." (*Assn. of Nat. Advertisers, Inc. v. Lungren* (9th Cir. 1994) 44 F.3d 726, 732; see also 5 McCarthy on Trademarks and Unfair Competition, *supra*, § 27:121 [similar].)[27]

The broad "public concern" exception to false advertising liability suggested by the court of appeal would also have the perverse effect of insulating false or misleading claims from liability when there is widespread public interest in a product—that is, when consumers are most likely to be attentively focused on a seller's claims and, therefore, when accuracy is especially important. For example, consumers are often highly interested in claims about a product's purported health benefits and willing to change their purchasing habits and lifestyles to take advantage of those benefits. In one recent case, POM Wonderful made highly exaggerated and otherwise unsupported claims

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[27] See, e.g., FTC, Press Statement, *FTC Sues VW over False Clean Diesel Claims* (Mar. 29, 2016) <https://www.consumer.ftc.gov/blog/2016/03/ftc-sues-vw-over-false-clean-diesel-claims> (as of Jan. 25, 2021) ["VW extensively promoted its 'Clean Diesel' vehicles as environmentally friendly, having low emissions, and being legally compliant" when, in fact, "the vehicles' emissions greatly exceeded government emissions standards"]; California Dept. of Justice, Press Statement, *Attorney General Kamala D. Harris Sues Plastic Water Bottle Companies over Misleading Claims of Biodegradability* (Oct. 26, 2011) <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-sues-plastic-water-bottle-companies-over> (as of Jan. 25, 2021); cf. Bus. & Prof. Code, § 17580.5 [barring sellers from making false or misleading environmental claims].

about the supposed health benefits of drinking pomegranate juice—including the bold suggestion that the juice "prevents and treats prostate cancer, and works 40 percent as well as Viagra" in addressing erectile dysfunction. (Klein, *POM-Boozled: Do Health Drinks Live Up to Their Labels?*, CNN (Oct. 27, 2010).)[28] The result was that the company's juice products became "increasingly popular with consumers," generating significant media interest. (*Ibid.*) That level of interest, however, in no way insulated POM Wonderful's claims from false advertising scrutiny. (See *POM Wonderful*, *supra*, 777 F.3d at pp. 484-488.)[29]

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[28] Available at <https://www.cnn.com/2010/HEALTH/10/27/health.pom.drink.labels/index.html> (as of Jan. 27, 2021).

[29] See also, e.g., *Kasky*, *supra*, 27 Cal.4th at pp. 964-965 [significant public interest in Nike's labor practices did not insulate it from liability]; FTC, Press Statement, *FTC Sends Letters Warning 20 More Marketers to Stop Making Unsupported COVID-19 Treatment* (Aug. 14, 2020) <https://www.ftc.gov/news-events/press-releases/2020/08/ftc-letters-warning-20-more-marketers-stop-making-covid-19-claims> (as of Jan. 25, 2021); Oxford, *More States Sue Opioid Maker Alleging Deceptive Marketing*, Associated Press (June 4, 2019) <https://apnews.com/article/738bf3e450444ee29d3aea50731329b7> (as of Jan. 25, 2021); California Dept. of Justice, Press Statement, *Attorney General Kamala D. Harris Seeks Immediate Halt to Corinthian Colleges' False Advertising to California Students* (June 27, 2014) <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-seeks-immediate-halt-corinthian-colleges'-false> (as of Jan. 25, 2021); Associated Press, *Kellogg's Pays $4 Million Settlement After Claiming Frosted Mini Wheats Make You Smarter*, Bus. Insider (May 29, 2013) <https://www.businessinsider.com/kelloggs-4m-frosted-mini-wheats-settlement-2013-5?IR=T> (as of Jan. 25, 2021).

The same should be true here. Questions about the authenticity of songs allegedly recorded by Michael Jackson shortly before his death naturally led to significant interest and debate among fans, members of the media, and the public more generally. (See, e.g., OBM 12 [discussing Oprah Winfrey interview addressing the controversy].) That level of interest made it all the more important for Sony to provide accurate information about the songs to consumers. Assuming Sony failed to do so—a question that has not yet been tried in the superior court—the First Amendment does not shield Sony from liability.

CONCLUSION

The Court should reaffirm the well-established principle that a seller's description of a product to potential purchasers qualifies as commercial speech. The First Amendment does not insulate a seller from false or misleading product claims because it purportedly lacks personal knowledge of the accuracy of the claims; because the product for sale is music or another form of artistic expression; or because the product claims relate in some way to a matter of public interest or debate.

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January 29, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Curiae Brief uses a 13-point Century Schoolbook font and contains 12,305 words.

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