

Case No. S251822

IN THE SUPREME COURT OF CALIFORNIA

Vera Serova,
Plaintiff and Respondent Below,

v.

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

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

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION.

Petitioner Vera Serova seeks review of a narrowly-tailored Court of Appeal opinion holding that Michael Jackson's posthumous album artwork, album title, and related identifying statements are non-commercial speech beyond the reach of California's UCL and CLRA statutes. Specifically, on Respondents' anti-SLAPP motion the Court found that there was widespread, public debate (which exists to this day) about whether Michael Jackson performed the lead vocals on three of the album's tracks.¹ And the Court found that Respondents were likely to prevail because as non-commercial speech, the artwork, title, and statements are entitled to full First Amendment protection as a matter of law.

There is no reason to review the Court of Appeal's opinion, which expressly stated the ruling was narrow and limited to the unique facts of this case. The opinion is consistent with the various Courts of Appeal's anti-SLAPP and First Amendment rulings, as well as this Court's precedent in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 (*Kasky*). To make it appear as though there is reason to grant review, Serova had to contort the

¹ Respondents are John Branca, as co-executor of the Estate of Michael J. Jackson ("the Estate"), MJJ Productions, Inc., and Sony Music Entertainment ("Sony," and collectively with the Estate and MJJ Productions, Inc., "Respondents").

For purposes of this appeal only, so as to permit the trial court to address the pure legal issue presented by the anti-SLAPP motion without trying to resolve who sang the vocals, Respondents hypothetically assumed that Jackson did not sing the lead vocals on the tracks in question. (CT 2:274.)

underlying decision into something it is not. As explained in more detail next, there is simply no reason to grant review of this well-reasoned opinion that necessarily cannot be applied beyond its unique facts.

Serova contends review is warranted on both steps of the anti-SLAPP analysis, but identifies no split of authority or unsettled question of law that would justify review on either. She simply argues that the Court of Appeal was wrong in finding at step one that statements on or about Michael Jackson's first posthumously released album involve a matter of public interest. There is no need to review this portion of the opinion because it does not create a split in authority, it is not capable of being misapplied, and most fundamentally, it is right. Serova's argument defies common sense and contradicts her own express allegations about the widespread controversy over the vocalist. And if credited, her argument would contravene all of the established case law finding that speech about celebrities generally meets the standard for speech connected to an issue of "public interest."

On step two, she seeks review of the Court of Appeal's holding that the challenged artwork, title, and statements are commercial speech. Her arguments in this regard significantly mischaracterize the opinion and the authority on which it relies. For instance, she claims the Court of Appeal added a scienter element to the UCL and CLRA. It did not. The UCL and CLRA undisputedly apply only to commercial speech. And the Court of Appeal held that whether the speaker can verify the statements

at issue (which Serova equates to scienter) is **a factor** in determining whether speech is commercial. But in finding that the challenged artwork, title, and statements were non-commercial speech—in part because Respondents were not in position to verify them—the Court held that the UCL and CLRA simply **did not apply**. Thus, the Court could not and did not add scienter to (or even interpret) those statutes.

The Court of Appeal also noted the unusual facts of this case and expressly cautioned that its holding is entitled to only narrow effect. (Op. at p. 30.) This necessarily constricts any possible impact on future litigation.

Finally, reading her Petition, one would think Serova is without a remedy. This is also untrue. In addition to her UCL and CLRA claims against Respondents, Serova brought a fraud claim against the people she alleges to have produced the recordings, namely the Angelikson Defendants.² That fraud claim against the source of the recordings was not part of this appeal, it is unaffected by its result, and it is not subject to a defense that the speech is non-commercial. (CT 3:715–35; CT 3:612.)³

² The Angelikson Defendants are defendants Edward Joseph Cascio, James Victor Porte, and Angelikson Productions, LLC. They are not parties to this appeal.

³ Serova candidly admits that she sued Respondents because they have deeper pockets than the Angelikson Defendants. (RB at p. 56.) But Serova cannot trample on Respondents' constitutional rights simply because the alleged wrongdoers lack funds to pay damages or plaintiff's attorneys' fees. (See *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th

Giving credence to Serova's theory of liability would chill artistic expression to its core. The remedies Serova sought here were either for the music not to be published (chilling speech), to have it be unattributed (which impermissibly alters its meaning and is utterly infeasible), or to force Respondents to place on the album "disclaimers" notifying consumers of the controversy (which is compelled speech and thus unconstitutional). Consistent with the First Amendment, the Court protected Respondents' good faith dissemination of creative artistic works and limited Serova's right to recovery to common law fraud—those who knowingly misrepresented the authenticity of the works. There is no basis to review the decision.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

Serova's claims arise from the release of an album titled *Michael*, which she describes as "the first posthumous compilation album of previously unreleased tracks by recording artist Michael Jackson[.]" released in the United States on December 14, 2010. (CT 1:116 [First Amended Complaint ("FAC") ¶ 10].)

She alleges that "Michael Jackson did not actually perform the lead vocals" on three of the album's ten tracks (dubbed the "Cascio Tracks" because defendant Edward Joseph Cascio jointly produced and recorded the songs). (CT 1:116 [FAC ¶ 13].) Serova

472, 490 [affirming judgment for the defendant where the lawsuit was "an artificial scheme designed not to fairly assess culpability but to reach into the deepest pocket"].)

does not allege Jackson had nothing to do with the Cascio Tracks, only that Jackson did not sing “lead vocals” on them. (CT 1:116–23 [FAC ¶¶ 13, 14, 18, 23, 29, 30, 32, 33].)

Serova specifically alleges that the Cascio Tracks’ producers, the Angelikson Defendants, “represented to Defendants Sony and the Estate that Michael Jackson performed the lead vocals[.]” (CT 1:117 [FAC ¶¶ 14–17].) Critically, she alleges that the Angelikson Defendants “*failed to disclose to Sony or the Estate that Michael Jackson did not perform the lead vocals on*” the Cascio Tracks. (CT 1:117 [FAC ¶ 18], emphasis added.) She also alleges that the Angelikson Defendants—not Respondents—“*had exclusive knowledge*” of whether Jackson sang the lead vocals on the Cascio Tracks. (*Ibid.*, emphasis added.)

According to Serova, public “controversy has surrounded” the issue of whether Jackson sang the lead vocals on the Cascio Tracks. (CT 1:116 [FAC ¶¶ 11–13].) She admits that in November 2010, Sony and the Estate both investigated the issue and publicly released the results of those investigations, both of which concluded Jackson sang the lead vocals. (CT 1:13–14 [FAC ¶¶ 13–14, 21–22].)

At issue in this appeal are the album’s artwork, its title, and statements on the album cover (the “Album Cover”) and in a video promoting the album (the “Announcement Video”). Serova claims they misleadingly imply that Jackson was the lead singer of the Cascio Tracks. As for the Album Cover, Serova challenges the title (“*Michael*”), the artwork, and a statement in a micro-font

on the back of the album that states: “This album contains 9 previously unreleased vocal tracks performed by Michael Jackson. These tracks were recently completed using music from the original vocal tracks and music created by the credited producers.” (CT 1:119 [FAC ¶ 27], 1:144–49; 4:894.) The Announcement Video, released on December 3, 2010, has creative and stylized images of Jackson and describes *Michael* as “a brand new album from the greatest artist of all time.” (CT 1:119 [FAC ¶ 24]; Lodged CD, Video No. 1 at 0min 23sec.)

Importantly, Serova also pleaded a fraud claim against the Angelikson Defendants, but not Respondents. The fraud claims are not at issue on this appeal and are pending in the trial court.⁴

Respondents filed a motion to strike under the anti-SLAPP statute, arguing the speech at issue was made in connection with an issue of public interest and Serova could not prevail because she challenged speech that is non-commercial and, therefore, not subject to regulation under the UCL or CLRA. The trial court granted Respondents’ anti-SLAPP motion in part and denied it in part, finding the album artwork, title, and Announcement Video were commercial speech and therefore Serova met her burden of showing a chance of prevailing on her UCL and CLRA claims on the pleadings pursuant to the parties’ stipulation.

Respondents appealed. In a 31-page published opinion, the Court of Appeal reversed, holding that the trial court should have

⁴ The case has been stayed in the trial court pending the outcome of this appeal.

granted Respondents' anti-SLAPP motion in its entirety because the challenged statements are non-commercial speech.⁵

Serova petitioned for rehearing in the Court of Appeal, raising largely the same issues presented in this Petition. The Court of Appeal denied rehearing on September 13, 2018, and modified the opinion to add a footnote. The modification did not alter the judgment.

III. LEGAL STANDARDS.

"The Supreme Court may order review of a Court of Appeal decision . . . [w]hen necessary to secure uniformity of decision or to settle an important question of law[.]" (Cal. Rules of Ct., rule 8.500, subd. (b)(1).)

If this Court were to grant review (which Respondents submit it should not), a ruling on an anti-SLAPP special motion to strike is subject to de novo review on appeal. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645; *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 357 (*Bernardo*).)

Anti-SLAPP motions require a two-step analysis. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) First, the defendant must make a prima facie showing that the challenged cause of action arises from protected activity, i.e., that the acts of which the plaintiff complains were taken in furtherance of the defendant's right of free speech in connection with a public issue.

⁵ The Court of Appeal affirmed the trial court's grant of the remainder of Respondents anti-SLAPP motion.

(*Ibid.*) Under the first step of the anti-SLAPP analysis, the Court determines whether the claims arise out of at least one of four types of protected activities. (Civ. Proc. Code, § 425.16, subd. (e).) “A defendant’s burden on the first prong is not an onerous one.” (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 590.) *Second*, “[i]f a defendant meets this threshold showing,” the burden shifts to the plaintiff and “the cause of action shall be stricken unless the plaintiff can establish ‘a probability that the plaintiff will prevail on the claim.’” (*Simpson Strong-Tie Co., Inc., supra*, 49 Cal.4th at p. 21, quoting Code Civ. Proc., § 425.16, subd. (b)(1).)

IV. ARGUMENT.

A. The Petition Should Be Denied Because There Are No Grounds for Supreme Court Review.

1. There Is No Question For Review At Step One Of The Analysis Because The Law Concerning Whether The Challenged Statements Were Made In Connection With An Issue Of Public Interest Has Been Settled For Decades.

Under the first prong of the anti-SLAPP analysis, the Court determines whether the claims arise out of protected activities. (Civ. Proc. Code, § 425.16, subd. (e).) The Album Cover and Announcement Video meet this test because they are statements made “in connection with . . . an issue of public interest[.]” (Civ. Proc. Code, § 425.16, subd. (e)(3)–(e)(4).)

As the Court of Appeal recognized, statements about the *Michael* album—the first posthumously released music from pop icon Michael Jackson—easily meet this test, as do statements

about the controversy surrounding the vocals on the Cascio Tracks. (Op. at pp. 14–16.) Long-settled case law supports that conclusion. An issue of public interest “is any issue in which the public is interested.” (*Tamkin v. CBS Broad., Inc.* (2011) 193 Cal.App.4th 133, 143, quoting *Nygård, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042.) “Like the SLAPP statute itself, ***the question whether something is an issue of public interest must be ‘construed broadly.’***” (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 199, citations omitted and emphasis added.)⁶ Michael Jackson’s celebrity alone renders statements about his first posthumously released album an issue of public interest. (See, e.g., *Hilton v. Hallmark Cards* (9th Cir. 2009) 599 F.3d 894, 906–908 [holding anti-SLAPP statute applied to claims based on a birthday card featuring the photograph and catchphrase of celebrity Paris Hilton because Hilton’s career and persona were issues of public interest]; *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1027 [holding that use of rock band No Doubt’s likeness was a matter of public interest “because of the widespread fame No Doubt has achieved”]; *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240,

⁶ “[T]hree non-exclusive and sometimes overlapping categories of statements” have qualified for anti-SLAPP protection because they address matters of public interest: (1) statements concerning “a person or entity in the public eye”; (2) speech “that could affect large numbers of people beyond the direct participants”; and (3) statements involving “a topic of widespread public interest.” (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 373, quotation marks, footnotes and citation omitted.)

1254, as modified (Apr. 19, 2017), rev. denied (June 28, 2017) [holding “celebrity gossip” can constitute a statement in connection with an issue of public interest for anti-SLAPP purposes “under established case law”]; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 677–678 “[T]here is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.”], internal quotations and ellipses omitted; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 [“The public’s fascination with Brando and widespread public interest in his personal life made Brando’s decisions concerning the distribution of his assets a public issue or an issue of public interest.”]; *Stutzman v. Armstrong* (E.D. Cal., Sept. 10, 2013, No. 2:13-CV-00116-MCE) 2013 WL 4853333, at p. 7 [finding cyclist Lance Armstrong’s statements concerning whether he used performance enhancing drugs, including in promotional materials for books he had written, met the public interest test].)

Moreover, Serova has *admitted* repeatedly that the album itself and whether Jackson sang lead vocals on the Cascio Tracks are matters of public interest; she alleges that in California alone, thousands of individuals have purchased the Cascio Tracks, she identifies numerous high-profile individuals who have publicly offered their opinions on the tracks’ authenticity, and she admits that the controversy was discussed in the press and on a segment of “The Oprah Winfrey Show.” (CT 1:118–23 [FAC ¶¶ 20, 22, 23, 25, 32, 38].)

Serova offers two arguments why the Court should review this portion of the Court of Appeal's decision. Neither withstands scrutiny.

First, she concocts a “split of authority” amongst the Courts of Appeal as to “how expansively or narrowly speech must be viewed” under this test. (Pet. at pp. 18–24.) But the cases she cites are all in accord with one another (and with the opinion here). Serova claims that “one line of appellate decisions” focuses “on the specific nature of the speech” and “another line of cases” evaluates the “public interest in general issues abstracted from the speech.” (Pet. at p. 8.) This is beyond splitting hairs; the statute covers all statements made “*in connection with* a public issue or an issue of public interest[.]” (Civ. Proc. Code, § 425.16, subd. (e)(4), italics added.) To the extent there is any difference between the “nature of the speech” and “general issues abstracted from it,” both formulations accord with the statute. Indeed, while Serova claims to have identified a “longstanding disagreement between the lower courts,” she admits that no case or other authority has remarked upon it in any way. (Pet. at pp. 18, 21.) That is because no split exists, and Serova's attempt to manufacture one as a basis for review fails.

In any event, Serova's argument that the Court of Appeal took the wrong approach as between this invented split of authority fails because it rests on a blatant mischaracterization of the opinion. Serova claims the Court of Appeal found the challenged statements to be protectable under the anti-SLAPP statute only “based on the public interest in Michael Jackson and

his body of work—topics only tangentially related to the album.” (Pet. at p. 8.) Not so. The Court of Appeal correctly noted that the statements concerned “the release of the posthumous album *Michael*” and the controversy surrounding it, both of which Serova herself alleged to be matters of great public interest. (Op. at pp. 14–16.) Moreover, even if the Court of Appeal had found the challenged statements to be a matter of public interest merely because they concerned Michael Jackson and his work more generally, that holding would be in accord with the long line of appellate authority cited above.

Second, she claims the opinion creates a split of authority with *Rezec v. Sony Pictures Entertainment, Inc.* (2004) 116 Cal.App.4th 135, as modified (Feb. 26, 2004). In that case, the challenged “advertisements did not reflect any character or portion of the films. Rather, they contained a *fictitious critic’s* favorable opinion of the films.” (*Id.* at pp. 142–43, emphasis added.) In ruling on the first prong, the Court held the knowingly fraudulent statements were not made in connection with a matter of public interest even though they concerned artistic works. The distinctions are obvious—here, there is no intentional fraud at issue, and the challenged statements clearly do reflect and include character and portions of the album.⁷ In

⁷ Further, the majority opinion in *Rezec* may be outdated and superseded by statute. In September 2003, the Legislature enacted a provision clarifying that commercial speech “based upon the creation, dissemination, exhibition, **advertisement, or other similar promotion of any . . . musical . . . or artistic work**” is eligible for anti-SLAPP production. (Civ. Proc. Code, §

fact, the Announcement Video contained audio from the album, and the Album Cover is obviously part and parcel of the artistic work itself.

Similarly, Serova claims the opinion creates a split with the many cases holding that a manufacturer's statements about **consumer products** do not meet the public interest standard at prong one of the anti-SLAPP analysis. (Pet. at p. 26.) As the Court of Appeal noted, these cases are readily distinguishable because consumer products do not implicate the sort of public controversy or public interest generated by the *Michael* album. (Op. at p. 16.)

In sum, there is no split of authority for this Court to resolve and, therefore, no basis to review the Court of Appeal's decision on prong one of the anti-SLAPP analysis. The challenged statements were obviously made in connection with an issue of public interest, as the Court of Appeal (and the trial court) correctly held.

2. There Is No Question For Review At Step Two Of The Anti-SLAPP Analysis Because The Court of Appeal Faithfully Followed *Kasky*.

At step two, the Court of Appeal found that Serova had no chance of prevailing on her UCL or CLRA claims because the challenged statements were not commercial speech and therefore

425.17, subd. (d), emphasis added.) The statute became effective January 1, 2004. The *Rezec* opinion was issued on January 27, 2004, and does not cite section 425.17. Thus it is not clear whether the Court considered its application or import.

those statutes did not apply. No aspect of this holding creates a conflict with other appellate authority or rests upon unsettled law. Accordingly, review is not warranted.

The UCL and the CLRA govern only commercial speech. (Pet. at p. 26.) The United States Supreme Court has defined “commercial speech” as speech that “does no more than propose a commercial transaction.” (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 66, internal quotations omitted (*Bolger*).) “If speech is not ‘purely commercial’—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection.” (*Stewart*, *supra*, 181 Cal.App.4th at p. 685, quotation marks and citation omitted.) The analysis of whether speech is commercial is guided by three factors: whether the speech (1) is a traditional advertisement; (2) references a product; and (3) was economically motivated. (*Bolger*, *supra*, 463 U.S. at pp. 66–67.) This Court subsequently described the three factors as “the speaker, the intended audience, and the content of the message.” (*Kasky*, *supra*, 27 Cal.4th at 960.)

Applying the three-factor test set forth in *Kasky*, the Court of Appeal found the third factor, the content of the speech, rendered the challenged statements non-commercial. This holding was based on multiple interrelated findings—namely, that the challenged statements were expressive (i.e., did more than promote a transaction) because identifying the singer of the tracks comprised “an important component of understanding the art itself” (*id.* at p. 26); that Respondents did not have personal knowledge of the content of the message, and had no means of

verifying it (*id.* at pp. 20–21); and that the challenged statements were opinions in the sense that they concerned a matter of irresolvable public controversy, and thus were not actionable factual assertions (*id.* at p. 23).

The Court of Appeal also held that to permit Serova’s claims against Respondents to proceed would violate the First Amendment because it would either chill speech (by disincentivizing the distribution of art if there were any scintilla of question as to its authorship) or impermissibly compel speech (by requiring purveyors of art to include a “disclaimer” about the controversy despite concluding the tracks were authentic after performing an investigation). (*Id.* at pp. 24–25.)

Indeed, while Serova concludes that the challenged statements are “advertisements” (see, e.g., Pet. at pp. 15–16, 26), they are not. Serova sued over ***part of the artistic work itself***—namely, the album’s title and cover artwork. While Serova argued that the Album Cover was “not a part of the album’s expressive work” (RB at 35–36), she cites no authority for this extraordinary proposition. It would surely surprise an artist to learn that his or her choice of a title, or the artwork he or she created for an album, is not expressive. Album covers are unquestionably expressive works, and when consumers purchase (or even stream) an album, they expect to also receive that expressive content. Similarly, even though the title is simple (“*Michael*”), it is expressive. (See *Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V.* (S.D.N.Y. 1990) 749 F.Supp. 1243, 1252, *aff’d* (2d Cir. 1994) 17 F.3d 38 [“Interpreting the Lanham

Act broadly to protect movie titles invokes first amendment concerns because movie titles are a form of artistic expression.”]; *Stutzman, supra*, 2013 WL 4853333, at pp. 17–18 [“The speech at issue does more than merely propose a commercial transaction, because it describes the contents of the Books, the Books’ classification as a biography, and describes one of the Books’ authors . . . the promotional materials relating to the Books are inextricably intertwined with the Books’ contents, which is non-commercial speech”].) While the title here happens to connect the artist to the album generally, the title was an artistic choice to use the artist’s first name only, and in a particular font and manner, like an artist’s personal signature on the corner of a painting, or the title of his or her self-portrait. Those choices represent expressive works in and of themselves.

Serova’s claims the Court misapplied *Kasky* because its three-part test “does not contain on its face a requirement that the speaker has personal knowledge of whether his speech is true.” (Pet. at p. 28.) But the opinion does not hold that commercial speech “requires” the speaker’s personal knowledge; it was only one of many factors it considered—just like *Kasky*. (See Op. at pp. 23–24.) And Serova completely ignores that *Kasky* expressly permitted courts to consider whether a factual statement was verifiable; it even emphasized the importance of personal knowledge to the commercial speech analysis in noting that the United States Supreme Court’s precedent on this issue “assumes that commercial speech consists of factual statements ***and that those statements describe matters within the***

personal knowledge of the speaker.” (*Kasky, supra*, 27 Cal.4th at p. 962, emphasis added.)

Serova also misrepresents the Court of Appeal’s discussion of this issue; the point is not just that Respondents lacked personal knowledge of the singer’s identity, but instead that there was no way for Respondents to conclusively verify it. In other words, the opinion relies not upon whether Respondents *verified* the challenged statements (and they did so to the best of their ability) but whether the statements were conclusively *verifiable* by Respondents (and they were not). This analysis closely follows *Kasky*, which held verifiability to be a factor in determining whether speech is commercial. (*Id.* at p. 963 [holding Nike’s statements were commercial speech because “Nike was in a position to readily verify the truth of any factual assertions it made”]; *id.* at p. 962.) Other cases similarly include verifiability as a component of the analysis. (See, e.g., *Bernardo, supra*, 115 Cal.App.4th at p. 348 [holding an advertisement not commercial speech where it does not involve “readily verifiable factual assertions” but instead matters of “genuine . . . debate”]; *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1224 [advertisements were commercial speech where defendant misrepresented the “verifiable fact” “that the investment club’s actual average rate of return from 1984 to 1994 was 9.1 percent as opposed to the advertised 23.4 percent”].)

Next, she claims the opinion impermissibly rewrites the UCL and CLRA to include a scienter component. (Pet. at p. 29.) That is not even a colorable interpretation of what the Court of

Appeal did. It is undisputed that if the UCL and CLRA apply, then there is no scienter requirement. It is also undisputed that the UCL and CLRA only apply to commercial speech. The Court of Appeal considered verifiability as a factor in the analysis of whether or not speech is commercial. If the speech at issue is commercial, then the UCL and CLRA could apply on a strict liability basis. If the speech at issue is not commercial, like here, then the UCL and CLRA do not apply at all. In neither case does the opinion read or add a scienter requirement into the statutes.

Finally, she claims the opinion would nullify the “bona fide error” defense available under the CLRA. (Pet. at p. 30, citing Civ. Code, §§ 1782, 1784.) This argument is waived because Serova failed to raise it below. (Rules of Court, Rule 8.500, subd. (c)(1) [“on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal”].)⁸ Moreover, it is a nonstarter because, again, it assumes the very question presented; the bona fide error defense is only relevant *if* the CLRA applies in the first instance, i.e., if the challenged statements are commercial speech. The mere fact that a bona fide error defense exists does not mean the CLRA can or should apply to non-commercial speech like the statements challenged here.

⁸ A footnote to the opinion mentions this provision of the CLRA in dicta. (Op. at p. 24, fn. 8.) It noted that the defense only applies where the defendant “makes an appropriate correction, repair or replacement or other remedy of the goods and services[.]” (Civ. Code, § 1784.)

In sum, review of the Court of Appeal's decision at prong two of the anti-SLAPP analysis is not warranted.

B. The Court Of Appeal's Holding Avoids Constitutional Infirmities.

Under Serova's theory of the case, if Respondents distribute the Cascio Tracks, to avoid liability they must include a message to consumers that discloses the possibility that a singer other than Jackson sang the lead vocals on the Cascio Tracks—even though Respondents believed Jackson did. Serova's Petition **completely ignores** the Court of Appeal's discussion of why recent Supreme Court precedent confirms that the ruling Serova seeks is unconstitutional. (Op. at p. 24.) The Court of Appeal explained that the "United States Supreme Court recently emphasized the potentially problematic nature of regulations that compel speech, even in a commercial context." (*Ibid.*, citing *Nat'l Inst. of Family & Life Advocates v. Becerra* (2018) ___ U.S. ___, 201 L.Ed.2d 835 (*Life Advocates*).) And a ruling "compelling disclosure of the controversy . . . to avoid liability . . . would, in effect, require Appellants to present views in their marketing materials with which they do not agree." (Op. at p. 25.) This would represent an "impermissible 'content-based regulation of speech.'" (*Ibid.*, citing *Life Advocates*, 201 L.Ed.2d at p. 846.) Serova offers no response to or discussion of this aspect of the opinion.⁹

⁹ Having failed to address it in her Petition, she may not raise the issue for the first time in her Reply. (*Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 79, fn. 6 ["We generally disregard arguments raised for the first time in a reply brief."].)

Indeed, Serova's request that the Court impose some sort of disclosure requirement upon Respondents tramples upon Respondents' core First Amendment right of expression. At oral argument in the trial court, Serova's counsel and the court engaged in a disturbing exchange regarding how Respondents should have designed the Album Cover and related statements. (See, e.g., RT 633:2–3 [The Court: "Maybe Michael' would have been a much better title."]; RT 632:26–27 [Serova's counsel suggesting the title: "Maybe It's Michael, Maybe It's Not, But It's A Record And Here Have A Listen."]; Op. at p. 24, fn. 9.) At appellate oral argument, Serova's counsel reiterated that Respondents should avoid liability for distributing the songs only if they offered a disclaimer announcing to consumers that some people think the lead vocals were sung by someone other than Jackson, even if Respondents think he did. These impermissible attempts to shape expressive works underscore why the Court of Appeal got it right, and why no review is warranted. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340 ["a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship"]; *Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 675 ["[t]he creative process must be unfettered, especially because it can often take strange turns . . . We must not permit juries to dissect the creative process in order to determine what was necessary to achieve the final product and what was not, and to impose liability . . . for that portion deemed unnecessary"], citation and internal quotation marks omitted.)

C. Review Is Unwarranted Because The Court Of Appeal's Opinion Properly And Carefully Balances The Public Interests In Consumer Protection And Promoting Artistic Expression.

Obviously, this case required that either First Amendment expression must be subjugated to the public interest in consumer protection, or vice versa. The Court of Appeal's decision carefully treads the line between these two competing objectives, crafting a narrow ruling that protects Respondents' First Amendment rights while avoiding any significant impediment to the enforcement of consumer protection laws.

Meanwhile, Serova's Petition hyperbolically and incorrectly argues that the opinion "will reinstate the 'buyer beware' policy in California and may endanger the health of the state and national art market" by "provid[ing] blanket immunity to false attribution of art by resellers." (Pet. at pp. 34, 37.) This is baseless. Even in this very case, there is no "immunity" provided to any "false attribution," because Serova is pursuing her fraud claims against the Angelikson Defendants in the trial court.

Moreover, Serova's argument defies common sense and ignores market realities. She claims that as a result of the opinion, art purveyors will purposely avoid investigating the provenance of the work, so as to be able to escape liability under the CLRA or UCL. (Pet. at p. 36.) But the Court of Appeal's decision rested not on the fact that Respondents *failed to verify* the truth of the statements, but that they were *not verifiable*. Moreover, reputation matters in the art business; it would not be advantageous for an art dealer to sell a paintings that ended up

being a forgery. The market thus contains inherent protections against the harms Serova claims will result absent review.

Similarly, she claims with no factual basis whatsoever, let alone citation to the record, that “publishers do not ordinarily reveal who they license the rights to creative works from, and art auctions do not reveal the identities of owners,” and therefore plaintiffs will not be able to identify or sue the true fraudsters. (Pet. at p. 36.) In fact, the only evidence in the record on this point shows the concern is nonexistent, as Serova had no difficulty identifying the Angelikson Defendants here. Nor is there any reason to think it would be a problem in other cases that fall within the exceedingly narrow scope of the opinion, which it applies only where there is a public controversy surrounding the work’s authorship. Where there is public controversy, alleged fraudsters are often flushed out by the media, governmental or voluntary investigations, or potentially pre-litigation discovery procedures. As such, Serova’s parade of horrors is both unsupported and unlikely.

D. The Court of Appeal’s Opinion Is Narrow And Limited To The Unusual Facts Presented.

Another reason review should be denied is that the opinion expressly limited its holding to the facts and issues implicated in this unusual case:

[T]here is no apparent reason why a statement falsely stating that a particular song is included in an album should be subject to full First Amendment protection simply because the statement promotes the sale of music. However, where, as here, a

challenged statement in an advertisement relates to a public controversy about the identity of an artist responsible for a particular work, and the advertiser has no personal knowledge of the artist's identity, it is appropriate to take account of the First Amendment significance of the work itself in assessing whether the content of the statement was purely commercial. This conclusion is consistent with the flexible approach that the United States Supreme Court has adopted for identifying commercial speech.

(Op. at p. 29, footnote omitted; see also *id.* at p. 30 [“Nor do we purport to decide whether statements in another context concerning the marketing of creative works might constitute commercial speech.”].) It also made clear that nothing in the opinion applied to Serova’s fraud claim against the Angelikson Defendants. (*Id.* at p. 30.) Thus, the opinion may have little precedential effect, and does not even prevent Serova from having her day in court in this very case.

In sum, the practical implications of the opinion are far less extreme and harmful than Serova claims. In fact, due to its expressly narrow holding and the unusual facts at issue here, the opinion may have limited precedential value. This forms another basis to deny review.

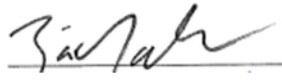
V. CONCLUSION.

Serova has failed to show a lack of uniformity of decision or an unsettled important legal principle. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

Dated: October 29, 2018

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WORD COUNT CERTIFICATION

The undersigned counsel for Respondents certifies pursuant to rule 8.504(d)(1) of the California Rules of Court that the word count for this document using Microsoft Word is 5,911 words, including footnotes but excluding the tables and this certificate, and certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on October 29, 2018.

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