No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari
to the Supreme Court of California

BRIEF OF *AMICUS CURIAE*
CENTER FOR INDIVIDUAL FREEDOM
IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom (the "Center") is a nonpartisan, nonprofit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including free speech rights, property rights, privacy rights, the right to keep and bear arms, the freedom of association, and religious freedoms. Of particular importance to the Center in this case are constitutional protections for the freedom of speech, including the right of business persons and corporations to engage in robust public discussion and debate regardless of whether their speech is categorized as commercial.

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. At its core, the "commercial speech" doctrine addresses speech that does nothing more than propose a commercial transaction. Because such transactional speech is intertwined with, and forms part of, the underlying transaction, it may indeed present different concerns than does purely communicative speech. Those concerns, however, do not warrant a separate and special doctrine for commercial speech. Instead they can be addressed by treating transactional commercial speech as an instance of mixed speech and conduct and thus applying the familiar test for regulations of mixed speech and conduct found in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Substitution of that standard approach in place of the current commercial speech doctrine would be more consistent with overall First Amendment principles and would readily resolve this case. Nike's speech at issue here is not the transactional speech that is at the core of existing commercial speech doctrine, involves only pure speech, and should be treated no differently than any other speech.

Absent a complete rejection of the commercial speech doctrine and a return to standard First Amendment jurisprudence, this Court has several other options for bringing coherence to the area of commercial speech and for countering the uncertainty and burden on speech created by the decision below. One approach would be to confine the commercial speech doctrine to core transactional speech and exclude all non-transactional speech by commercial speakers from the scope of the doctrine. That solution would add considerable certainty to the definition of commercial speech, returning it to its earlier formulations, and would provide needed protection for speech that is most likely to involve matters of public importance regardless of the character of the speaker. Alternatively, this Court could create specific bright-line exclusions from the commercial speech doctrine for speech that involves a publicly debated issue and for speech that involves the character and operations of a public company. Both types

of speech, by definition, involve matters of public concern, particularly given the growing importance of and focus on corporate governance and operations. And by offering clear and defined limits on the lesser-protected category of commercial speech, such exclusions would create the breathing room necessary for debate about commercial topics of public concern. Under any of the suggested approaches, Nike's speech in this case would be fully protected and the decision below would be in error.

2. Even assuming, *arguendo*, that Nike's speech fell within the current commercial speech doctrine and that such doctrine were to remain intact, several aspects of the California speech-liability regime in this case combine to call for heightened scrutiny regardless of the treatment of commercial speech in general. In particular, California has removed numerous procedural protections on litigation in this area that have historically served to limit the speech-suppressing effect of common-law causes of action, it has discriminated between commercial and noncommercial speakers whose statements have functionally identical effects on consumers, and it has imposed a nationwide standard for speech by threatening to penalize extraterritorial speech that made it to California through the ordinary processes of an integrated national media. The result is a tremendous burden on both commercial and noncommercial speech.

Those aspects of the California liability regime offend not only the First Amendment, but intrude upon values also protected by the Due Process, Equal Protection, and Commerce Clauses. Operating, as it does, at the intersection of the First Amendment and multiple other constitutional safeguards, the California regime deserves heightened scrutiny regardless of whether it nominally targets only lesser-protected commercial speech. Just as equal protection or due process analysis ratchets up when another fundamental right is involved, so too should First Amendment scrutiny increase when other constitutional values are simultaneously implicated.

ARGUMENT

The California Supreme Court held that speech on one side of a hotly debated issue of public concern nonetheless received lower First Amendment protection as "commercial speech" because the speaker was a commercial entity and the topic related to the speaker's own business. Pet. App. 1a. Based on that flawed conclusion, the court below upheld a California speech-liability regime that lacks even a modicum of procedural or substantive safeguards for speech based on the assumption that "governments may entirely prohibit commercial speech that is false or misleading." *Id.* Both elements of the court's reasoning were dangerously wrong.

Nike's speech in this case should not be categorized as commercial speech for purposes of lowering its protection under the First Amendment. This Court should either clarify or abandon existing commercial speech doctrine to ensure the proper level of protection for the type of public debate at issue in this case. Furthermore, because the California regime restricts speech in a manner that also offends Due Process, Equal Protection, and Commerce Clause interests, it should receive heightened scrutiny under the First Amendment regardless of whether it targets generally less-protected commercial speech.

I. THE COMMERCIAL SPEECH DOCTRINE SHOULD BE PARED BACK TO BE CONSISTENT WITH STANDARD FIRST AMENDMENT DOCTRINE.

The California Supreme Court was able to reach its burdensome result in this case by applying an overly broad definition of "commercial speech" and then excessively denigrating the First Amendment protection given to such speech. While there is much to criticize about the interpretation of this Court's cases by the decision below, this case presents the far more valuable opportunity to reconsider the continuing valid-

ity of the commercial speech doctrine or, at a minimum, its scope and substance.

It is the Center's view that the separate commercial speech doctrine as developed through cases such as *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), is inappropriate and unnecessary. Rather, the legitimate regulatory concerns at the intersection of speech and commercial transactions can and should be handled through the application of the familiar test from *United States* v. *O'Brien*, 391 U.S. 367 (1968), for regulations of conduct that have an incidental impact on speech. And even were this Court to decline to reconsider the overall existence of the commercial speech doctrine, a focus on a more traditional approach to speech intertwined with conduct can serve as a valuable guide to imposing sensible limits on the scope and substance of the existing doctrine.

A. Core Commercial Speech Involves Mixed Speech and Conduct That Should Be Subject to Traditional First Amendment Analysis.

When grappling with the First Amendment scrutiny appropriate for so-called "commercial speech," this Court has concerned itself primarily with "speech that does no more than propose a commercial transaction." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 544 (2001); *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993); *Board of Trustees* v. *Fox*, 492 U.S. 469, 473-74 (1989); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). Such speech indeed raises concerns different from those raised by pure speech alone because it is intertwined with, and an inseparable component of, the underlying commercial transaction itself. Speech that proposes a commercial transaction thus is properly viewed as mixed speech and conduct rather than as pure speech.

At times, however, this Court has expanded the category of commercial speech to include pure speech that merely relates to a speaker's business activities and does not form part of a transaction itself. *See Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983) (identifying commercial speech based on advertising format, product reference, and speaker motivation); *Central Hudson*, 447 U.S. at 561 (commercial speech described as "expression related solely to the economic interests of the speaker and its audience"). That more expansive approach, and the resulting reduction in First Amendment protection that has accompanied categorization as commercial speech, lacks a sound basis under the First Amendment.

In recent years, the commercial speech doctrine has become subject to considerable criticism. *United Foods*, 533 U.S. at 409 (citing *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504 (1997) (THOMAS, J., dissenting)); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 518 (1996) (THOMAS, J., concurring in part and concurring in judgment); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (STEVENS, J., concurring in judgment)). That criticism reflects the lack of a historical or logical basis for treating so-called commercial speech differently from similar noncommercial speech. Much of that criticism could be resolved or mitigated by confining application of the commercial speech doctrine to its core of speech that "does no more than propose a commercial transaction." Such "transactional" speech is indeed "'linked inextricably' with the commercial arrangement that it proposes," *Edenfield*, 507 U.S. at 767 (citation omitted), and implicates legitimate state regulatory interests regarding the commercial transaction itself. Better still, this Court should abandon any distinct commercial speech doctrine and instead analyze the mixed speech and conduct in transactional speech through application of the familiar *O'Brien* test for regulations of conduct that create incidental burdens on speech. *O'Brien*, 391 U.S. at 377.

In *O'Brien*, the law at issue forbade harmful conduct – the destruction of an official document – that at times was intertwined with expression. *Id*. at 376. The law was upheld because the impact on speech was "incidental" to the underlying regulation of conduct, was "no greater than [was] essential" to accomplishing the interests of regulating the conduct, and met additional conditions designed to safeguard First Amendment values. *Id.* at 377.

In like manner, where the government seeks to regulate a commercial transaction, speech that proposes, and therefore is inextricably intertwined with, that transaction may incidentally be burdened by the regulation without offending the First Amendment. But the regulation would have to target the *operative* elements and effects of such speech – *i.e.*, the legally effective aspects of the speech such as the terms of an offer – and not merely the further or separate *communicative* aspects of the speech. For incidental burdens on any speech not itself effectuating the commercial transaction, the ordinary limits of *O'Brien* would apply and any regulation of the underlying transaction would have to be imposed for the "noncommunicative impact of [the] conduct, *and for nothing else*." *Id*. at 382 (emphasis added).

Use of the *O'Brien* test for core commercial speech adequately protects the government's legitimate interests in regulating the intertwined conduct of commercial transactions without sacrificing the communicative value of speech mixed with such transactions. And by being squarely within standard First Amendment analysis for speech in general, it obviates the need for constant litigation over the proper categorization of speech as commercial or noncommercial.

B. The Lesser Protection of the Commercial Speech Doctrine Lacks a Sound Basis.

The need to replace the commercial speech doctrine with standard First Amendment analysis applicable to all speech is reflected in the inadequate justifications given for differential

treatment of commercial speech. The decision below stands as an example of how commercial speech analysis has grown increasingly strained, especially when applied beyond the core of "transactional" speech.

The California Supreme Court recited three reasons for the reduced First Amendment protection given to commercial speech:

> First, "[t]he truth of commercial speech * * * may be *more easily verifiable by its disseminator* than * * * news reporting or political commentary" * * *.
>
> * * *
>
> Second, commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation.
>
> * * *
>
> Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is "'linked inextricably' to those transactions."

Pet. App. 11a-12a (citations omitted).

Those arguments do not justify a wholly separate standard of First Amendment scrutiny even for core transactional speech, and they lose all persuasive force when used in an attempt to distinguish non-transactional speech on a commercial topic – such as Nike's speech in this case – from other forms of fully protected speech.

Verifiability. The suggestion that the truth of commercial speech is more readily verified by the speaker than with noncommercial speech is both incorrect and irrelevant. Even within the core of transactional speech, many elements of a transaction are no more subject to precise determinations of truth or falsity than are comparable instances of political, economic, or other speech. The myriad of cases interpreting

ambiguous terms in commercial contracts seem proof enough of that proposition. And the simple example of a warranty of "suitability" is as subject to debate and disagreement as is a politician's claim of suitability for a particular elected office. Conversely, while certain aspects of commercial speech relating directly to a product indeed may be quite verifiable, a politician's recitation of his own background is likewise fully verifiable by the political speaker. The ease of verification of various statements by politicians does not cause differential treatment of political speech and likewise should not degrade the protection of commercial speech.

As for non-transactional speech on commercial matters, such speech is no more or less verifiable by the speaker than any other type of speech. Even assuming that Nike's speech defending its labor practices was commercial speech under current doctrine, such speech is no different than a politician's defense of his or her own hiring practices, voting record, or personal indiscretions. In the latter instances, the politician is no less aware of the facts regarding his or her own personal behavior and may well be better able than a large and far-flung corporation to verify the truth of self-referential speech. By contrast, a corporation's need to rely on reports from a myriad of agents and employees processing and distilling huge volumes of information from around the globe makes it extremely difficult to speak with perfect and unassailable accuracy on complex issues such as labor practices, product safety, and the like. A commercial entity's ability to speak at all thus is severely compromised by the threat of litigation for any conceivable inaccuracy regardless of materiality, regardless of the speaker's efforts to ensure accuracy, and regardless of whether anyone even relied on the speech.

The "verifiability" excuse for lower protection is all the more troubling in that it is unnecessary and overbroad as a means of attacking commercial fraud. For commercial assertions that are indeed more readily verified by the speaker, it should be that much easier to prove an intentional or reckless

falsehood under standard First Amendment doctrine. And where the supposed absolute "truth" of a particular non-transactional statement on a commercial subject is *not* so readily determined, the justification for lower protection ceases to apply and the many reasons for protecting uncertain speech rise to the fore.

Hardiness. The second claim that profit-motivated commercial speech is hardier than other speech simply is not true as a logical matter. Profit motivation, for example, does nothing to distinguish commercial speech from a book written in the hopes that it becomes a best-seller. It does nothing to distinguish commercial speech from a movie or a television show that must capture the attention and interest of an audience in order to generate profits. And, indeed, it does nothing to distinguish *all* speech by corporate speakers, who are presumably motivated to speak out on any issue – be it their own products or some proposed legislation impacting their business – only because such speech furthers their corporate interests. As a means of justifying a lower level of protection for a particular category of speech, therefore, the hardiness argument proves far too much and creates indefensible inconsistencies in the First Amendment treatment of similarly situated speech.

Furthermore, the argument that profit-motivation leads to hardiness of speech is wrong even on its own terms. In fact, precisely because commercial speech is motivated by the prospect of economic return it is *more easily* deterred by threats to such return than is political or even artistic speech. In the noncommercial realm, speakers are often motivated by deeply held convictions, an internal drive to make a point, or the basic need for self-expression. Such speech is notoriously difficult to suppress even by direct means, as numerous protests, sit-ins, and even graffiti serve to demonstrate. Speech that is primarily driven by a profit motive, however, is especially easy to chill simply by imposing a penalty that exceeds the expected economic return of such speech. And the scales

tip more easily against speech where the expected economic return from the speech is low or indirect, and the economic consequences of even a meritless lawsuit are large. Given the often-slim profit margins that exist in competitive markets and the potentially devastating liability threatened by schemes such as California's, even the risk of litigation and liability will readily outweigh the economic value of large quantities of speech by corporations.

The inaccuracy of the "hardiness" argument is especially glaring once the definition of commercial speech is allowed to creep beyond the core of transactional speech. While it is true that proposing commercial transactions is necessary to do business at all, and thus will continue until the cost of such speech outstrips the profit margins of the speaker, other speech by commercial entities certainly is not *essential* to profits and hence will be more readily chilled. In Nike's case, for example, the company's Corporate Responsibility Report was in fact chilled because of the great imbalance between the potential return from such speech and the risk of litigation from even a completely truthful report. Pet. 28. And even for speech that might be thought directly relevant to sales transactions, the chilling effect will not be on the existence of such speech *per se*, but rather on its form. Corporations will be forced either to pare back their product descriptions to the bare minimum needed to complete any transaction while reducing or avoiding the risk of litigation, or they will load their speech with overwhelming qualifiers and disclaimers, rendering such speech largely useless as a genuine means of conveying information to consumers.[2]

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[2] The latter path creates the sort of information overload that can be seen in some pharmaceutical or consumer-product contexts. The purchaser is so flooded with unwanted information regarding trivial risks that it becomes virtually impossible to tease out the genuine risks. Rather, the more important speech gets lost in the noise of the trivial speech included only as a defense against overzealous litigation. Such overly qualified and

The hardiness excuse for diminished protection of commercial speech suffers from yet another flaw: Even assuming a decreased prospect of chilling certain commercial speech, that factor is already taken into account in the otherwise applicable *O'Brien* test. That test asks, among other things, whether the "incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of" the government's legitimate interest in regulating the intertwined conduct. 391 U.S. at 377. Insofar as a particular example of commercial speech is less likely to be chilled, the government would have more leeway in regulating intertwined conduct without imposing an excessive burden on First Amendment freedoms. But that determination should be made on a case-by-case application of the *O'Brien* test, just as it is for all other speech, and not via an inaccurate and illogical generalization about a broad category of so-called commercial speech.

Government Interest in Regulating Commercial Conduct. The third and final notion that government's authority to prevent commercial harms somehow alters its power over speech bound up with a commercial transaction is of dubious validity on several levels. The fact that government regulation has a valid goal surely has little or nothing to do with the level of scrutiny to be applied when the pursuit of that goal directly or indirectly burdens speech. While a legitimate goal of preventing commercial harms would surely be acceptable under the first part of the *O'Brien* test, there is no reason such a goal should also eliminate the remainder of that test. And as for the closeness of speech and the transaction that is the valid object of government regulation, that is the very situation for which the *O'Brien* test exists – intertwined speech and conduct.

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cautious discussion of important issues is the antithesis of the robust exchange of information and ideas contemplated by the First Amendment.

If the notion instead is that commercial harms are, as a category, somehow more important than other harms and therefore justify greater power to restrict speech, that notion is simply wrong on its face. The miscellaneous economic harms that might arise from erroneous commercial decisions based on genuinely false commercial speech surely are not even of the same magnitude as the harms that might arise from erroneous *political* decisions based on false speech. Political speech determines who runs the country, what laws are adopted, and whether the country goes to war. The impact of a misguided decision in any of those areas dwarfs the consequences of buying a set of sneakers based on a potentially mistaken view of Nike's labor policies.[3]

Furthermore, in the vast majority of instances where the government seeks to burden or restrict speech, there is little doubt that the harm the government seeks to prevent is well within its authority to address. The damage to reputation sought to be prevented or remedied by libel law, for example, is plainly a legitimate government interest no less valid than an interest in consumer protection, yet the First Amendment test is not diminished as a result. Likewise, the government's interest in avoiding violence from speech that might incite its listeners is of an extremely high order, yet the First Amendment is rigorous in its protection of speech that does not pose a clear and present danger of generating such unlawful conduct. In virtually every noncommercial instance of standard First Amendment analysis the government's interest plays a role only in the *application* of the relevant scrutiny, not in the alteration of the underlying standard itself. There is no sound reason that the government's interest in commercial matters should be any different.

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[3] And if commercial matters are deemed less important than political matters, there is no reason why the regulation of such concerns justifies a special exception to the usual protection afforded by the First Amendment to speech touching upon matters from the vital to the mundane.

By returning its focus to the core transactional speech that initially motivated the commercial speech doctrine, this Court would have no need for a separate and controversial doctrine based upon tenuous distinctions between commercial speech and other speech. Rather, the familiar *O'Brien* test is all that is needed to accommodate legitimate government interests, with other non-transactional speech by commercial speakers being accorded the same protection as the equivalent speech by anyone else.

C. Any Commercial Speech Doctrine Must Contain Limits to Protect Robust Public Debate.

Even if this Court declines to return commercial speech back to the main body of First Amendment analysis, the California Supreme Court's expansive definition of commercial speech sweeps in far more expression than is allowed by the First Amendment and is so uncertain in its boundaries that it generates an extensive penumbra of threat to protected speech. At a minimum, this Court should impose clear limits on the scope of what may be treated as "commercial speech" so that fundamental First Amendment interests in public discussion and debate are protected.

The California Supreme Court's categorizing as commercial speech virtually all "representations of fact about the speaker's own business operations for the purpose of promoting sales of its products," Pet. App. 1a, is shockingly broad and encompasses speech well beyond the specifics of this case. The statute itself, for example, applies to persons discussing anything related to the sale of any "property" or "services" by virtually any means whatsoever, including "public outcry or proclamation." Pet. App. 87a (CAL. BUS. & PROF. CODE § 17500). If the sale of "services" is no less commercial than the sale of products, then it would seem that all businesses, professionals, and even sports teams can be subjected to liability for what they say about themselves. Even employees and political candidates – selling the "services" of

their labor – are seemingly engaging in commercial speech by California's lights. And insofar as purchasing or investment decisions are thought to be made on the basis of the public's moral view of a company, then virtually *nothing* a company could say to the public would be immune from categorization as commercial speech.

Whatever the current application of the decision below, therefore, the line between commercial and noncommercial speech it creates is far "too elusive for the protection of" First Amendment freedoms. *Winters* v. *New York*, 333 U.S. 507, 510 (1948). The multiple factors relied upon by the court to distinguish between commercial speech and other forms of speech do not stand up to scrutiny, and hence offer no predictive security for future defendants. For example, the suggestion that a profit motive behind "advertising" justifies lesser protection, Pet. App. 12a, does not distinguish it from much other speech and hence leaves many speakers uncertain as to whether their speech is commercial. And whether speech has a purpose of promoting some eventual transaction, Pet. App. 1a, is an essentially meaningless factor in a world where consumer decisions can turn on a myriad of factors unrelated to the substance of the product or service itself, and hence virtually any speech could be alleged to relate to promoting sales.

The combined breadth and uncertainty of the definition of commercial speech adopted below thus poses an exceptional threat to speech both within and anywhere near the boundaries of California's liability regime.

While the best solution would be to eliminate any separate commercial speech doctrine, as suggested above, a less comprehensive step would be at least to confine the commercial speech doctrine to its core of speech that does nothing more than propose a commercial transaction. Such a limitation would not resolve all of the historical and logical problems with the commercial speech doctrine, but it certainly would tend to mitigate those problems and would be sufficient to reverse in this case.

Finally, if this Court is unwilling to entertain either the elimination or significant contraction of the commercial speech doctrine, an alternative means of confining that doctrine would be to emphasize certain clear elements that remove speech from the confines of the doctrine and return such speech to normal First Amendment treatment. The two elements that the Center proposes are (1) whether the speech involves a publicly debated issue and (2) whether the speech involves the character and operations of a public company. Drawing bright-line exclusions from the commercial speech doctrine for such speech would go a long way toward eliminating the uncertainty and chill that will result from the amorphous decision adopted by the court below.

Speech involving publicly debated issues, commercial or otherwise, plainly makes a "direct contribution to the interchange of ideas," *Virginia State Bd. of Pharmacy*, 425 U.S. at 780, and thus should be clearly excluded from the doctrine. That the debate over Nike's labor practices formed part of the larger debate on globalization and was discussed by both the news and editorial components of media entities throughout the country amply confirms that Nike's statements were not simply matters of private commercial concern. Similarly, given the ongoing public and legislative exchanges over corporate morality, character, and responsibility, discussions of company character and operations, as opposed to direct and immediate attributes of a product or transaction itself, should be excluded from down-categorization as commercial speech. Discussions of the character of public companies, like discussions of public figures in general, are far more likely to involve broader public issues for which the First Amendment seeks to guarantee robust public debate.

"The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Edenfield*, 507 U.S. at 767. Where the ideas and information in the commercial marketplace have in fact generated broader public debate within society and government as a whole, speech by commercial entities must

ernment as a whole, speech by commercial entities must be given an equal opportunity for robust expression within the marketplace of ideas.

Whether the commercial speech doctrine is eliminated in favor of the *O'Brien* test, narrowed to cover only core transactional speech, or merely is given the suggested clear limits regarding publicly debated issues and companies that are the equivalent of "public figures," Nike's speech in this case would not constitute commercial speech and should receive undiluted First Amendment protection.

II. CALIFORNIA'S SPEECH-LIABILITY REGIME SHOULD RECEIVE HEIGHTENED SCRUTINY REGARDLESS OF HOW THE SPEECH IS CATEGORIZED.

Assuming, *arguendo*, that Nike's statements constitute commercial speech generally subject to the less rigorous protections of the *Central Hudson* test, there are several aspects of California's speech restrictions that still justify elevated scrutiny. In this case, the speech-regulating regime approved below will create uniquely burdensome and nationwide injuries to First Amendment freedoms. Applicable to great swaths of expression, California's liability scheme eliminates fundamental procedural, substantive, and territorial protections that otherwise limit the burdens on speech imposed by more traditional causes of action. The removal of such protections simultaneously implicates the First Amendment and other, intersecting, constitutional concerns in the areas of due process, equal protection, and interstate commerce. The level of scrutiny thus should be increased regardless of the presumptive level of protection for commercial speech or any lesser scrutiny of restrictions on such speech in general.

A. First Amendment Due Process and the Elimination of Procedural Safeguards.

Acting on the premise that "governments may entirely prohibit commercial speech that is false or misleading," Pet.

App. 1a, the court below sanctioned a speech-liability scheme devoid of many procedural protections that serve to guard against burdensome yet easily made charges that speech is false or misleading. The absence of such protections means that even *fully protected* commercial and noncommercial speech will be plagued with difficult-to-dismiss claims, potentially crippling remedies, and years of litigation. The mere threat of such litigation will undoubtedly chill many speakers and will critically handicap public debate.

In this case, numerous traditional restraints on private claims that would otherwise mitigate the danger to speech have been discarded in favor of a single-minded effort to deter and suppress supposedly false or misleading speech. For example, the California speech regime effectively eliminates standing as a requirement to bring suit, allowing "any person" to sue on purported behalf of the "general public." Pet. App. 84a (CAL. BUS. & PROF. CODE § 17204). It abolishes any need to include "[a]llegations of actual deception, reasonable reliance, and damage," or to plead fraud with specificity. *Committee on Children's Television, Inc.* v. *General Foods Corp*., 673 P.2d 660, 668, 669 n. 11 (Cal. 1983). And, consistent with a regime unrelated to actual consumer injury, a California court may impose massive financial penalties – misleadingly dubbed "restitution" – "without individualized proof of deception, reliance, and injury." *Id*. at 668; *see also Fletcher* v. *Security Pacific Nat'l Bank*, 591 P.2d 51, 56-57 (Cal. 1979) ("section 17535 authorizes restitution not only of any money which *has been acquired* by means of an illegal practice, but further, permits an order of restitution of any money which a trial court finds '*may have been acquired* by means of any * * * [illegal] practice.'") (emphasis altered).[4]

To prevent such a crippling chill, First Amendment jurisprudence incorporates various procedural protections in order

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[4] In addition to such penalties, claimants may seek injunctions against speech, compelled speech, and attorney's fees. Pet. App. 4a.

to confine, predictably and consistently, any permissible speech restrictions to their proper and limited domains. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) (discussing intersection of due process and First Amendment); *see also Waters* v. *Churchill*, 511 U.S. 661, 669 (1994) (plurality opinion) ("we have often held some procedures * * * to be constitutionally required in proceedings that may penalize protected speech"); *id*. at 686-87 (Scalia, J., concurring in the judgment) (agreeing that the "First Amendment contains within it some procedural prescriptions" at least for deprivations through the judicial process). Because it often can be hard to discern, *ex ante*, the substantive line between protected and unprotected speech, the First Amendment relies on various procedural devices to create the necessary "breathing space" for protected speech. *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

Those procedural protections include heightened proof requirements, actual injury requirements, and scienter requirements for causes of action that would suppress speech. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277, 279 (1964) (discussing absence of criminal-law procedural safeguards in civil libel suits and then imposing on plaintiffs the burden of proving "actual malice" by the speaker); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (private figure plaintiff limited to actual damages where he fails to satisfy *New York Times* standards). Common-law limits on damages actions – such as standing and causation requirements – also serve to constrain the volume of litigation based upon speech, and hence mitigate the First Amendment dangers.

Furthermore, in the context of commercial speech, requirements such as standing, causation, and actual injury serve, either directly or indirectly, to tie any challenged speech closely with the underlying commercial transaction and harms, thus serving as an indirect assurance that the speech is indeed integrally related to a commercial transaction. Thus, not only do procedural limits perform a function

of protecting speech from spurious claims on the merits or from chill, they also serve a categorization function by helping to identify core "commercial" speech.

Procedurally protected breathing space is especially important where the basis for imposing liability is the alleged falsity of the speech at issue. Our Constitution, jurisprudence, and tradition have little faith in government processes to dictate the "truth": "[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945). We generally have been content to protect against the hazards of false speech with the tonic of competing speech, entrusting the public, rather than the government, to decide which of the opposing positions is true and which is false. *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Such concerns are especially prominent where the alleged factual inaccuracies are bound up in a contentious and complicated debate about globalization that combines both fact, interpretation, opinion, and advocacy. Under those circumstances, even the attempt to excise supposedly separate "facts" from the debate in order to impose liability will inevitably burden the accompanying ideas and opinions as well. And, as this Court has observed, "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40.

The absence of so many traditional procedural safeguards in California's liability regime is compounded by California's extension of liability to *truthful* speech subsequently deemed to be misleading and by the absence of any meaningful scienter requirement. Such a trivial threshold for initiating and sustaining a suit multiplies the danger of suppressing pro-

tected speech and makes it exceptionally difficult to obtain pre-trial dismissal or summary judgment. It also increases the prospect of unanticipated liability for speech. Making liability depend on interpretations of the intent and effect of speech

> puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [¶] Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Thomas v. *Collins*, 323 U.S. at 535.

The net effect of California having abandoned so many traditional limits on speech-suppressing suits is that vast quantities of entirely truthful speech will be penalized and deterred. It will be easy to claim that speech is false or misleading in the context of contentious public issues that often have no black and white answers. Disagreements and conflicting interpretations are rife in such public debates, and much of the partisan advantage from a charge of falsehood – burdening one's adversary, chilling further speech – can be gained from the charge itself, regardless of the eventual outcome of the case.

Those consequences alone infringe upon First Amendment freedoms and require at least some heightened scrutiny. "Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer * * * wider of the unlawful zone,' * * * and thus 'create the danger that the legitimate utterance will be penalized.'" *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) (citations omitted); *see also FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) ("that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities"); *First Nat'l*

Bank of Boston v. *Bellotti*, 435 U.S. 765, 786 n. 21 (1978) ("burden and expense of litigating" uncertain requirements would "unduly impinge on the exercise of the constitutional right" to free speech). Such First Amendment burdens exist independent of whether the legal regime is *targeted* at speech that ultimately may be regulated. *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965) (absent procedural safeguards for film censorship scheme that provided for prohibition of, *inter alia*, obscene films, "it may prove too burdensome to seek review of the censor's determination").

Whatever hardiness one might imagine inheres in commercial speech, such resilience will be overwhelmed by California's singular determination to make it easy to bring suit against speech on commercial topics. Furthermore, the elimination of so many procedural safeguards vastly expands the suppression not only of the supposedly commercial speech targeted by the liability regime, but also of noncommercial speech that is not covered – and that could not be covered – by California's restrictions. Because the procedural laxness of California's liability regime overwhelms the effect of a commercial characterization of the speech being targeted, heightened scrutiny is appropriate.

B. Speaker Discrimination and Equal Protection.

In addition to due process safeguards, the First Amendment incorporates Equal Protection Clause principles in order to provide a check against distortion of the marketplace of ideas and to guard against abuse of individuals and groups holding minority or disfavored views. "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980).

California's speech-regulating regime involves just such discrimination "among speakers conveying virtually identical messages" and thus is "in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broadcasting Ass'n* v. *United State*s, 527 U.S. 173, 194 (1999). There is no material difference, in terms of the interests behind California's unfair competition law, between the speech by petitioners in this case and the speech to which petitioners were responding. The anti-Nike criticisms were plainly targeted to consumers and others and were designed to influence purchasing and other decisions. They were no more difficult to verify, were more likely to create actual injury (to Nike), and were more likely to be relied upon by consumers, who are often skeptical of a company's denials of corporate wrongdoing. Yet speech by businesspersons and entities is subject to liability in California while identical or more problematic speech by others is protected.

Such discrimination is contrary to the well-recognized principle that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporate, association, union, or individual." *Bellotti*, 435 U.S. at 777; *see also Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 535 (1980) (limiting "the means by which [a corporation] may participate in the public debate on * * * controversial issues of national interest and importance," "strikes at the heart of the freedom to speak.").[5]

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[5] The discrimination between speakers also undermines the alleged state interests of protecting consumers and competitors and "promoting fair competition in commercial markets." Pet. App. 5a. The purported desire to serve those interests by purging commercial debate of falsehoods rings particularly hollow where California simultaneously leaves unregulated materially identical statements by Nike's critics that are equally or more likely to be false or misleading. California's "decidedly equivocal" approach to fairness and truth in the commercial marketplace of ideas and its failure "to adopt a single [state] policy that consistently endorses either

Many current issues now vigorously being debated involve conflicts between the business community and certain segments of the public. Criticisms of accounting practices, stock broker behavior, and globalization generally force businesses into defending themselves against attacks from business critics. (Even debates involving abortion sometimes involve providers of abortion services – business entities within the scope of California's liability regime – defending themselves against criticism from abortion opponents.) The California regime imposes a predictably anti-business bias on many pressing debates with the dangerous potential to distort public opinion and policy in an area already prone to political hay-making and a revived regulatory impulse. That imposed bias strikes at the combined concerns of both the First Amendment and the Equal Protection Clause, and thus warrants heightened scrutiny regardless of how the speech at issue might be characterized for First Amendment purposes alone.

C. Extraterritorial Burdens on Interstate Speech.

As with the intersection between the First Amendment and the Due Process and Equal Protection Clauses, there is likewise added concern – and greater scrutiny – where the First Amendment intersects with the Commerce Clause through a state's imposition of extraterritorial speech restrictions. In *Bigelow* v. *Virginia*, for example, this Court rejected a rule that would allow a state to exert power "over a wide variety of national publications or interstate newspapers carrying" similar speech because such a result "would impair, perhaps severely, the proper functioning" of the free exchange of ideas. 421 U.S. 809, 828-29 (1975). That Virginia had asserted an interest in protecting its own citizens was deemed insufficient when the means of protection was the functional assertion of "power or supervision over the internal

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interest," undermines the substantiality of its claimed interests. *Greater New Orleans Broadcasting*, 527 U.S. at 186-87.

affairs of another State." *Id*. at 824. Such extraterritorial assertions of power also are suspect in the particular context of commercial speech because they cast doubt on whether the speech being regulated is in fact so integrally related to a commercial transaction *in California* that it is properly categorized as commercial speech.[6]

In this case, California's speech-regulating regime has extensive extraterritorial application that would suppress speech not just in California but throughout the country. The speech California seeks to regulate in this case includes communications in numerous other states and in national publications, and was in response to similarly far-flung speech by Nike's critics. *See* Pet. App. 3a-4a (Nike statements in press releases, letters to editors and university officials, and paid newspaper advertisements); *id*. at 3a (criticisms raised on national television, in Financial Times, New York Times, Buffalo News, and Kansas City Star).

A core tenet of Commerce Clause jurisprudence is that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid." *Healy* v. *Beer Inst.*, 491 U.S. 324, 332 (1989); s*ee also Edgar* v. *MITE Corp*., 457 U.S. 624, 641 (1982) (plurality opinion) (state statute invalid because it "directly regulates

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[6] Furthermore, out of respect for both Commerce Clause and federalism concerns, where states other than California deem the speech at issue to be *noncommercial*, California's burden on such extraterritorial speech ought to be evaluated under normal First Amendment scrutiny rather than the lesser scrutiny provided for commercial speech restrictions. Such an approach would safeguard the decisions of those other states to protect non-transactional speech such as presented in this case. As petitioners pointed out, California's liability regime is unique throughout the country for its depth and breadth of regulation. Pet. 29. While the matter might be different if it were the Federal Government imposing uniform regulations on supposedly commercial speech – for then the Commerce Clause concerns would be absent – where there is an inevitable inconsistency between the speech regulatory regimes of different states, there should be heightened scrutiny of the more restrictive regimes.

transactions which take place across state lines, even if wholly outside the State"). Such a law is invalid "whether or not the commerce has effects within the State" and a state may not adopt "legislation that has the practical effect of establishing" rules of conduct "'for use in other states.'" *Healy*, 491 U.S. at 336 (citation omitted).

Just as "extraterritorial regulation of interstate commerce" squarely conflicts with the Commerce Clause, *id*. at 332, extraterritorial regulation of commercial speech conflicts with both the Commerce Clause and the First Amendment and thus constitutes an especially egregious constitutional affront. In this case, the effect of California's regime is effectively to regulate "commerce that takes place wholly outside of the State's borders," *id*. at 336, by establishing singularly rigorous minimum standards for business speech that will, by necessity, apply throughout the country. Those standards apply to speech occurring wholly outside California and between businesses and citizens of other states because of the near certainty that any such speech will eventually find its way into California through nationwide and global media sources. Any business wishing to communicate to the public anywhere in the country – or the world – thus will have to do so on California's terms.

Such a California-*über-alles* approach to regulation is simply unacceptable in an era of national and international communications. Just as the available reading material for adults cannot be reduced to that suitable only for children, *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957), so too in the commercial speech area, robust public debate throughout the country involving business practices and products cannot be sanitized to the degree apparently necessary for citizens of California. Citizens of all other states are more than willing to hear a robust debate on business issues and to take the constitutionally required risk of a potentially false or misleading exchange. They are willing to judge such matters for themselves as part of their decision-making processes when evalu-

ating that debate, rather than cede judgment to the government via litigation that would inevitably squelch such debate. That California would make a different choice for its citizens offends the First Amendment even within that state, but it stands as a First Amendment abomination when imposed by California on the citizens of all other states.

California's extraterritorial regulatory regime would be invalid even were the targeted behavior purely economic activity. It thus is all the more improper where it operates in the constitutionally protected realm of speech. The combined offense of California's regime to both the First Amendment and the Commerce Clause at a minimum warrants higher scrutiny than if the case involved only First Amendment concerns alone. And under any level of scrutiny beyond that applied by the court below, the California regime would fail.

CONCLUSION

For the foregoing reasons, the decision of the California Supreme Court should be reversed.

Respectfully Submitted,

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