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 AMICI CURIAE THE ASSOCIATION OF NATIONAL ADVERTISING, INC., THE AMERICAN ADVERTISING FEDERATION, AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the California Supreme Court's "limited-purpose" test for determining whether speech by a corporation is commercial or noncommercial speech violate the First Amendment?

2. If Nike's speech is deemed commercial speech, did the California Supreme Court violate the First Amendment by failing to properly apply the *Central Hudson* test?

3. Are Sections 17204 and 17535 of the California Business and Professions Code unconstitutional as applied by the court below because the statutes are vague and overbroad and allow a private party to sue without showing any harm from the speech in question?

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INTEREST OF AMICI CURIAE[1]

The Association of National Advertisers, Inc. ("ANA"), the American Advertising Federation ("AAF"), and the American Association of Advertising Agencies ("AAAA") (collectively referred to as "Amici") respectfully submit this brief amici curiae in support of Petitioners. Counsel for both parties have consented to the filing of this brief.

Amici are the three most important trade organizations in the advertising industry. They are identified in detail in the appendix to this brief. Collectively, Amici and their members are experts in communicating with the public at large. They believe the California Supreme Court's decision below will have a serious effect on the services Amici's members can perform. Amici and their members have a direct and continuing interest in this case and all other cases that threaten the rights of advertisers and their agencies to communicate freely with the public.

SUMMARY OF ARGUMENT

This case is one of the most important free speech cases to come before this Court since *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). It raises fundamental issues that go to the core of the First Amendment—the freedom of public debate about political, economic and social issues. Like the *New York Times* case, there is a claim that a corporate speaker has used commercial speech. Unlike *New York Times*, however, in this case there was no attempt to raise funds, no claim of harm, and the Petitioner was responding to public statements attacking it.

Nike's Speech Is Fully Protected By The First Amendment

The speech at issue in this case should be fully protected under the First Amendment—either because it is not commercial speech or because it is commercial speech deserving of full First Amendment protection. Nike's statements about globalization and its labor practices concerned matters of political, economic

1. Pursuant to Rule 37.6, Amici state that no counsel representing a party in this case authored this brief in whole or in part and that no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

and social concern and were made in the context of a debate started by its critics. By not recognizing this speech as fully protected, the California Supreme Court has strayed far from this Court's First Amendment jurisprudence.

Amici's Lodging accompanying this brief (the "Lodging") and Point II below demonstrate that in today's world, where corporate speech in advertising takes on so many different forms and addresses issues far beyond the price and quality of goods, it is necessary for this Court to reaffirm the commercial speech doctrine and further clarify that corporate speech is not *per se* "commercial speech." The Court should take this opportunity to set the California Supreme Court back on track, by repeating clearly in the face of the misguided decision below what the Court has said before: (1) that "the core notion of commercial speech . . . [is] 'speech which does 'no more than propose a commercial transaction'" (*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (*quoting Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976))), and (2) that commercial speech is speech that informs consumers "who is producing and selling what product, for what reason and at what price." *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (*quoting Va. State Bd. of Pharmacy*, 425 U.S. at 765).

Clearly speech like Nike's, that is made in connection with a public debate on issues of political, economic and social concern, without mention of the price or quality of a product or service, does not fall within the definition of commercial speech laid down by this Court.

The California Supreme Court Incorrectly Found Nike's Speech To Be Commercial Speech

Serious constitutional questions are posed whenever a state seeks to impose controls on the exercise of speech. This case raises the question of whether a corporation can be subject to litigation and possible liability under the California statutory scheme for engaging in public discourse on political, economic and social issues, where its speech makes no mention of the

quality or price of its products, or even of a product at all, and where the *plaintiff is a private citizen who has not alleged any harm*.

In the decision below, the California Supreme Court applied a new and unprecedented "limited-purpose" test comprised of three elements: (1) a commercial speaker; (2) an intended consumer audience; and (3) a message consisting of commercial facts. *See Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 960 (2002). In applying this test, the court below determined that Nike's statements were commercial speech because Nike was a commercial speaker, its intended audience included consumers and its statements contained "factual representations about its own business operations." *See id.* at 963-64. Such a formulation is so broad and sweeping that only in the rarest circumstances would corporate speech not be found actionable.

The California Supreme Court's unprecedented decision makes Nike face potential liability for participating in a public debate. Nike became one of several corporations targeted in an intense public debate on globalization. In response to the public criticism made against it, Nike disseminated in press releases, letters to universities, interviews and in an advertisement, statements concerning the international campaign for labor rights and reform, the cost of foreign labor and its own labor practices abroad. Such statements—whether asserted against a corporation or by a corporation—are not commercial speech and deserve full First Amendment protection.

The California Supreme Court's Application of* Central Hudson *violates the First Amendment

The analysis of commercial speech prescribed by this Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), has generally stood the test of time.[2]

2. Under *Central Hudson* and its progeny, for a restriction on commercial speech to be upheld (1) the commercial speech must concern lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation in question must directly and materially advance the governmental interest asserted; and (4) the (Cont'd)

The test adopted by the California Supreme Court improperly applied the *Central Hudson* analysis. The State of California cannot meet its burden to show that California's statutory scheme is not more extensive than necessary to serve a substantial government interest.[3] The California statutes impose strict liability and allow a private citizen to bring an action, without alleging any harm whatsoever, based only on an allegation that the public is likely to be deceived by the speech. Corporations are left with totally inadequate guidance as to what is and what is not actionable commercial speech. The result is that advertisers and their advertising agencies will be forced to steer far wide of this "unlawful zone" of speech, in fear of being hauled into the courts of California. *See N.Y. Times*, 376 U.S. at 725. As this Court held in *New York Times*, such a result violates the First Amendment. *Id*.

Even if Nike's statements could be found to be commercial speech, they still would be entitled to full First Amendment protection. Nike's statements said nothing about the price or quality or other attributes of its products. In his concurrence in *Rubin*, Justice Stevens explained that any effort to treat commercial speech differently from its non-commercial cousin should be based on a careful functional analysis of the justification for greater regulation. 514 U.S. at 494-96 (Stevens, J., concurring). In this case, the first commercial speech case before the Court where the government is not a party, no such analysis was made by the court below.

Finally, as applied by the California Supreme Court, the California statutes are unconstitutionally overbroad and vague. To state a claim under the statutes, a plaintiff need merely allege

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(Cont'd)

regulation must not be more extensive than is necessary to serve that interest. 447 U.S. at 566; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

3. California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq*., (West 2003) and its false advertising law ("False Advertising Statute"), CAL. BUS. & PROF. CODE § 17500, *et seq.* (West 2003).

that a statement is likely to deceive the public. Such a vague standard fails to adequately delineate between what is and what is not proscribed conduct under the statutes.

Amici respectfully submit that this Court should reverse the decision below and strike down the California statutes as unconstitutional.

I. The California Supreme Court's "Limited-Purpose" Test Violates The First Amendment Because Nike's Speech Is Fully Protected Noncommercial Speech

The California court developed a novel and unprecedented "limited-purpose" test to define what is commercial speech. It held that commercial speech occurs wherever there is a commercial speaker, an intended consumer audience and a message consisting of commercial facts. This formulation is a gross distortion of this Court's demarcation between commercial and noncommercial speech. The court found that Nike's statements were commercial speech because Nike is a corporation, it intended its statements to reach consumers and its statements contained factual representations about its own business operations. *See Kasky*, 27 Cal. 4th at 963-64. However, this determination leaves little speech by any corporation that would be noncommercial speech. Only speech that does no more than propose a commercial transaction should subject a corporation to suit under California's statutes. *See Va. State Bd. of Pharmacy*, 425 U.S. at 765. Nike's statements do not propose a commercial transaction, and thus the California court's decision that the statements are commercial speech must be reversed.

Discussion of "public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (*citing NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). The First Amendment gives all speakers the right to try to persuade the listener of the rightness of their position. *Id.*

Nike's advertisement and its other speech were part of a public debate surrounding its labor practices, globalization and Nike's role in the world economy. Public interest groups, labor

unions and others had made public statements attacking Nike, and called for the boycott of its products. Nike, the object of criticism, was merely responding in the only way it knew how—through public speech. Corporations, speaking through advertising, press releases and other public statements, should be afforded the same protections in responding to such attacks as those who initiated the debate. If not, the various people who speak on behalf of a corporation will be in a quandary as to how to respond. For example, the CEO will not know how to answer questions from the press and the public relations staff and other employees will not know how to address inquiries from the public.

A. This Court's Decisions In *Thornhill* And *Thomas* Held That Speech Like Nike's Is Protected By The First Amendment

Thornhill v. Alabama, 310 U.S. 88 (1940), and *Thomas v. Collins*, 323 U.S. 516 (1945), concerned debates regarding issues of public concern and are thus dispositive here. Like the speakers in *Thornhill* and *Collins* and their progeny (including the *New York Times* in *New York Times v. Sullivan*), the fact that Nike, and other advertisers like it responding to public criticism, have an economic interest in the political speech debate does not make their speech any less protected. *See*, *e.g.*, *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (finding economically motivated speech to be protected by the First Amendment).

In *Thornhill*, which concerned a state ban on picketing in labor disputes, this Court explained that speech concerning "satisfactory hours and wages and working conditions in industry" is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill*, 310 U.S. at 103. Moreover, this Court opined:

> *Every* expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful

> discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.

Id. at 104 (emphasis added). The California Supreme Court's view that the state may restrict petitioners' speech as commercial speech goes against this reasoning in *Thornhill*. The State may not "impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern." *Id.*

The California Supreme Court's decision is blatant viewpoint and content discrimination. The California court's suggestion that it would be possible for Nike to discuss globalization and address its accusers in general terms, without mentioning facts specific to its business activities (*See Kasky* 27 Cal. 4th at 966), is not only a poor and meaningless solution, but also constitutes improper censorship. *See Thomas*, 323 U.S. at 535-537 (finding a requirement that speakers split their remarks apart is improper suppression of speech).

In *Thomas*, which found that the First Amendment protects both employers and employees with respect to a ban on solicitation of union membership, the Court held: "When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end." *Thomas*, 323 U.S. at 536-537. Like the speaker in *Thomas*, Nike should not be confined to speaking about globalization and labor practices in the abstract. Nike is entitled to the same freedom of expression granted in *Thomas* and should be free to engage in the debate concerning its labor practices, which are the modern day version of the exact issues in *Thomas*. The California court's new theory, that Nike should be deprived of its First Amendment protection because statements about its labor practices may influence the buying decisions of a segment of the population, is unprecedented and incorrect.

B. The Court Below Improperly Focused On The Speaker Rather Than The Content Of The Statement

The California Supreme Court's "limited-purpose" test makes the identity of the speaker the dispositive factor in determining whether speech is commercial speech. In focusing on the speaker rather than the content of the speech, the California Supreme Court failed to recognize the public's right to hear and evaluate, and then accept or reject, Nike's speech. The public's interest is substantial—its right to receive the free flow of information from all sides of the debate must be met. Advertisements, press releases and other public statements all carry information of import on significant issues of the day. The California Supreme Court's decision flies in the face of this Court's critical statement in *First Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978), that it is impermissible for there to be a "prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues. . . ." Where, as here, the law gives "one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.* at 785-86 (footnote omitted).

In effect, the California Supreme Court has determined that the public needs to be safeguarded from Nike's speech, and speech like it. But, there is no danger from which the public needs to be protected. It may be that certain individuals choose to purchase or not to purchase products based upon a corporation's business practices. These decisions are made separate and apart from any consideration of the price or quality of the products and services being purchased. Commercial speech is not at issue in such a situation, but rather something more akin to the First Amendment notion of freedom of association. *See 44 Liquormart*, *Inc.*, 517 U.S. at 502 ("It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'") (*quoting Cincinnati v. Discovery Network*, *Inc.*, 507 U.S. 410, 426 (1993)).

If someone feels that they have been misled into associating with a corporation, and the individual's sole harm is the association itself, the solution is not to restrict that corporation's speech, but to keep the dialogue of the debate open so that the individual has all the information available to him or her necessary to make an informed decision. To ostensibly "protect" citizens by limiting a corporation's ability to speak freely when there is no cognizable harm is the essence of paternalism. And, this Court has repeatedly rejected and scorned attempts to restrict speech for reasons amounting to paternalism. *See*, *e.g.*, *Va. State Bd. of Pharmacy*, 425 U.S. at 770; *Florida Bar v. Went For It*, *Inc.*, 515 U.S. 618, 631 n.2 (1995).

Furthermore, the court below misses the point in arguing that Nike's speech is protected as long as it is not false or misleading. As this Court noted in *New York Times*, quoting John Stuart Mill, "even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *N.Y. Times*, 376 U.S. at 279 n.19. We do not protect false speech for its own sake. "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch*, 418 U.S. 323, 341 (1974); *Philadelphia Newspapers*, *Inc. v. Hepps*, 475 U.S. 767, 778 (1986). "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth. . . . [E]rroneous statement is inevitable in free debate. . . ." *N.Y. Times*, 376 U.S. at 271-72. There can be no "strict liability" for First Amendment protected speech.

It must be remembered that Nike was the subject of a public attack here by groups who had their own interests that were adverse to Nike's. Nike's ability to respond and participate in the public debate without being subject to a regime of scrutiny that is not applicable to its attackers is the essence of the protections of the First Amendment. That such a response includes paid advertising does not change the legal analysis because there are many alternative forms of free public speech,

such as statements made to the press, public demonstrations and boycotts, available to anyone wishing to voice an opinion.

The public at large, in addition to Nike's actual and intended customers, has the right to receive information from all sides of this international debate. "Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy*, 425 U.S. at 756 (internal footnote omitted). The First Amendment serves an "informational purpose" that guarantees "the public access to discussion, debate, and the dissemination of information and ideas." *Bellotti*, 435 U.S. at 782 n.18; *see also Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). Thus, not only Nike, but all of us, will lose if the California Supreme Court's failure to protect Nike's speech is upheld.

II. Amici's Lodging Illustrates The Far-Reaching And Chilling Impact Of The Decision Below

Since the very beginning of this nation, advertising has played an important role in our society. *See*, *e.g.*, *44 Liquormart, Inc.*, 517 U.S. at 495-96. A robust discourse through advertising encourages competition, provides useful information to a wide audience and helps generate jobs. *See* WEFA GROUP, ADVERTISING TAX COALITION, THE ECONOMIC IMPACT OF ADVERTISING EXPENDITURES IN THE UNITED STATES (1999). As technological advances make communicating across the world easier, advertising, as an important means of such communications, has evolved as well. Through the work of the advertisers and the agencies whom Amici represent, advertisements are created every day and placed in all forms of media so that individuals, the government and organizations, both in the for-profit and not-for-profit worlds, are able to convey their message to their intended audience efficiently and effectively.

For corporate speakers, advertising is not only a way to promote a particular product, but also a way to add their unique voices to the chorus of debate regarding issues of public concern. This may occur in a variety of ways: through sponsorship of events and programs, product placement in film and television

programs, banner advertising on the Internet and through the use of traditional advertising techniques, such as advertisements in all forms of print media, outdoor billboards and television and radio commercials. Simply because speech appears in the form of a paid advertisement, does not mean that it is commercial speech. The corporate speaker, like an individual speaker, may choose to use advertising not just for self-promotion, but also to promote a certain cause or opinion.

In creating advertisements, a company's goal may be to publicize its corporate image by, for example, showing how it is a good public citizen, or by taking sides on a public issue or by responding to criticism. This type of image advertising may, at the end of the day, make the public feel good about the company and thereby help sell products to a certain segment of the public. However, this corporate image speech is not commercial speech and the California Supreme Court's decision to the contrary must be rejected.

The California Supreme Court has in effect placed a gag order on corporate speakers from entering the public discourse through advertising. In addition, the California Supreme Court's decision has turned corporate speakers' use of public relations tools such as press releases, correspondence and interviews into *de facto* actionable conduct as commercial speech. Under the California Supreme Court's new test, any time a corporation's speech includes mention of facts about its business operations, the speech is transformed into commercial speech.[4] *See Kasky*, 27 Cal. 4th at 961, 964. In order to fully understand the impact of this ruling, Amici have lodged with the Court examples of print, television and radio advertisements that show the types of advertisements that could fall within the California Supreme Court's definition of actionable commercial speech. *See* Lodging at L-2 to L-16. Through the Lodging, Amici have attempted to provide the Court with a representative small sampling of the

4. The California Supreme Court's decision makes no distinction between paid and unpaid utterances. Amici, as representatives of the advertising industry, are most concerned here with speech in paid advertisements.

type of speech that will be chilled if the California Supreme Court's decision is permitted to stand.

Based on the California Supreme Court's ruling, courts in California could now find advertising like that in the Lodging to be commercial speech. As a result, advertisers and advertising agencies could be subject to expensive and time-consuming litigation for merely exercising their First Amendment rights by participating in the course of a public debate. In order to prevent this injustice, Amici believe that this Court should now make clear again that corporate speech, such as the advertising in this Lodging, that bolsters a corporation's opinion or image, but does not explicitly propose the purchase of a particular product or service, is not commercial speech and is fully protected by the First Amendment. *See Va. State Bd. of Pharmacy*, 425 U.S. at 765.

The majority of the advertisements presented in the Lodging fall into three broad categories (although there is overlap among them): (1) advertisements placed in direct response to specific public criticism or specific events ("Responsive Advertisements"); (2) advertisements placed to express a commitment to social responsibility ("Social Responsibility Advertisements"); and (3) advertisements placed to weigh in on a debate of public interest ("Public Debate Advertisements"). These advertisements, like the Nike advertisement, contain overtly political or social messages without any explicit mention of a commercial transaction. However, under the California Supreme Court's ruling, because these advertisements contain facts about a company's business practice, they, and other advertisements like them, could be subject to the restrictions of California's UCL and False Advertising Statute.

A. The Nike Advertisement

There is only one paid advertisement at issue in this case; the other statements complained of are found in press releases and letters to newspaper editors and university presidents and athletic directors.[5] Plaintiff alleged that this advertisement, in

5. The advertisement is annexed as Exhibit FF to the *Kasky* Complaint.

and of itself, was false and misleading in violation of the UCL and False Advertising Statute. *See Kasky* Complaint at ¶¶51-58. The California Supreme Court's decision discussed the advertisement together with the statements made to the press and university officials. *See*, *e.g.*, *Kasky*, 27 Cal. 4th at 947–48. In making its determination about the speech complained of, the California court did not find, as it should have, that the advertisement was not commercial speech. While Amici also believe that Nike's statements to the press and university officials are not commercial speech, as representatives of the advertising industry, Amici have chosen to focus on demonstrating here why Nike's advertisement and advertisements like it are fully protected speech.

The advertisement is a simple, traditional print ad, placed by Nike in the *New York Times*, the *Washington Post*, the *San Francisco Chronicle* and other national newspapers. *See* Lodging at L-1. It begins with a quote attributed to Ambassador Andrew Young: "It is my sincere belief that Nike is doing a good job . . . but Nike can and should do better." The rest of the ad consists of three short paragraphs:

> After six months of investigation, visiting twelve Asian factories and interviewing hundreds of workers in Indonesia, China, and Vietnam about Nike's overseas labor practices, this was how Andrew Young concluded his independent 75-page report, released yesterday.
>
> Nike agrees. Good isn't good enough in anything we do. We can and will do better.
>
> For details on exactly how—and for a complete copy of Ambassador Young's report and recommendation—please call 1-800-501-6295, go to www.nike.com/report, or go directly to GoodWorks at www.digitalrelease.com and enter the keyword: GoodWorks.

At the bottom of the advertisement is the Nike "swoosh" symbol. *See* Lodging, L-1.

The Nike advertisement does nothing more than draw the public's attention to Andrew Young's conclusions in general in his report of his investigation of Nike's labor practices. It does not include any facts from the report itself. Moreover, Nike's references to its business practices, if indeed there are any, are nothing more than its opinion that it agrees with Ambassador Young's report and that it is striving to "do better" with regard to its overseas labor practices. Yet, almost inconceivably, the California Supreme Court found that this was actionable commercial speech.

In its decision, the California Supreme Court found the statements in the Nike advertisement were "making factual representations about its own business operations." *Kasky*, 27 Cal. 4th at 963. This ignores the context in which these statements were made—Nike was defending itself against attack on an issue that had garnered the attention of the public at large. Nike's speech is core First Amendment speech and imposing strict liability on such speech goes against the First Amendment's purpose of protecting "uninhibited, robust and wide-open" debate. *N.Y. Times*, 376 U.S. at 270. Nike's speech here is similar to that of other corporations responding to public criticism, engaging in public debate or generally speaking to issues of social concern. If an advertisement like Nike's that so clearly is not proposing a commercial transaction can be found actionable commercial speech, a vast array of other corporate advertising also will be swept into California's vague and onerous regulatory quagmire.

B. Responsive Advertisements

1. Ringling Bros. and Barnum & Bailey

In 2001, accusations by members of People for the Ethical Treatment of Animals ("PETA") prompted the filing of a criminal complaint in San Jose, California against Mark Oliver Gebel, an elephant trainer with Ringling Bros. and Barnum & Bailey circus ("Ringling Bros."), alleging cruelty to elephants in violation of the California penal code. On December 21, 2001, after a trial, Mr. Gebel was acquitted of the charges. *See* Greg Winter, *Circus Trainer Is Acquitted of Abusing A Rare Elephant*,

N.Y. TIMES, Dec. 21, 2001 at A15. Subsequently, Ringling Bros. placed an advertisement entitled "An Open Letter to Animal Rights Groups," signed by Kenneth Feld, Ringling Bros.' Chairman and Producer. Lodging at L-2. In the advertisement Ringling Bros. makes the following statements:

> After sitting through a trial in San Jose California, that should never have come to court, and witnessing a senseless waste of taxpayer's money, I am writing with the hope of appealing to your heart, your conscience and your common sense.
>
> *****
>
> I am appealing to you to use the millions you raise from your well-intentioned members to positively affect the lives of animals who are starving, ill, overpopulating, and dying in habitats that can no longer support them. Instead, your resources are being spent attacking Ringling Bros. and Barnum & Bailey® and other responsible organizations such as licensed zoos and aquariums who care for, raise, live, work, and play with their endangered animal partners under carefully regulated laws enforced by the United States Department of Agriculture.
>
> *****
>
> Ringling Bros. and Barnum & Bailey does not take animals out of the wild, and we have not done so for over 26 years. . . . The truth is no one is more concerned with the well-being of animals than Ringling Bros. . . . Our animal partners are healthy, well cared for, and content, and we know that because we have individual relationships with each and every one of them.

Under the California Supreme Court's ruling, by responding to attacks against it through the placement of advertisements like the one above, Ringling Bros. would be putting itself at risk of litigation under the UCL and the False Advertising Statute. Such a lawsuit could be brought by any citizen of California. One can imagine a member of PETA bringing a claim

because it believes that the statement that Ringling Bros.' animal partners are "content" is false and misleading.[6] If the California Supreme Court's decision is not overruled, such a lawsuit would be permitted to proceed. Quite simply, what was intended by Ringling Bros. as an opportunity to voice its opinions after a highly publicized trial and engage in debate with its critics, has been transformed by the California Supreme Court into actionable commercial speech, despite the fact that at no point in the advertisement does Ringling Bros. encourage people to attend a performance of its circus.

2. ExxonMobil's message

On the twelfth anniversary of the Exxon Valdez incident, ExxonMobil placed an advertisement entitled "Pounds of prevention, tons of cure." Lodging at L-3. In the advertisement, ExxonMobil explains that after the spill, "[t]anker safety became a public issue overnight," and then details its efforts to improve its business practices in this area, including the establishment of an "augmented safety and environmental management system," investment in "advanced navigational systems," "upgrad[ing] vessel inspections and repairs," changing tanker routes, expanding training of employees and performing random drug and alcohol testing of employees in "safety-sensitive positions."

ExxonMobil also promotes its improved record of tanker safety, including the following statements:

> In the last four years, our owned ships have transported more than *2.8 billion* barrels of oil worldwide, and lost less than *10 barrels*.

The advertisement concludes with the following thought:

> Tanker safety demands vigilance, systematic management, industry-wide cooperation and

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6. Indeed, in another context, PETA has brought an action under the same statutes at issue in the present case against the California Milk Advisory Board. In the complaint PETA alleges that the statements "Great cheese comes from happy cows," and "Happy cows come from California," are false and misleading because, as alleged by PETA, the cows are, in fact, not "happy." *See* Valerie Richardson, THE WASHINGTON TIMES, *PETA takes on California's 'happy cow' ads*, December 30, 2002.

> responsible regulatory oversight. All are needed to ensure that the public and the environment are as safe as we can make them.

Here, ExxonMobil used advertising to inform the public of its commitment to safety and emergency response in light of the Exxon Valdez incident and to publicize its improvement with regard to the occurrence of oil spills. The context of the message is clearly rooted in public concern about tanker safety, and it is common sense that ExxonMobil should have an opportunity to bring its voice to the discussion of this issue. However, because the advertisement also mentions facts about ExxonMobil's business practices, the California Supreme Court could permit a UCL action to go forward concerning such an advertisement, thus moving the debate from a nationwide forum of United States citizens to a jury of six in a California courtroom.

C. Social Responsibility Advertisements

Texaco has extensively promoted its commitment to a diverse workforce in a variety of advertisements.[7] Here, Texaco uses the opportunity of placing advertisements in the public eye in order to demonstrate that it is a socially responsible company and to project a positive corporate image.

One such print advertisement is entitled "Texaco: Delivering On Diversity." Lodging at L-7. It includes a photograph of Texaco's Corporate Director of Human Resources and begins with the statement, "THE PERFORMANCE OF TEXACO, INC. has proven that they have a commitment to increasing the

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7. *See*, *e.g.*, Texaco radio advertisement, "Business Relations: African Americans," Lodging at L-4; Texaco print advertisement, "Texaco Is Committed to Minority Business Development," Lodging at L-5; Texaco print advertisement, "At Texaco, we're dedicated to developing diverse sources of energy," Lodging at L-6. Texaco is not alone in its diversity advertising campaigns. *See* American Express print advertisement, "Diversity is the Nature of our Business," Lodging at L-8; Xerox print advertisement, "A Bunch of Copies, 6 people sitting at a table," Lodging at L-9.

diversity of their workforce." The advertisement then includes the following statements:

> From January 1997 through June 1998, minorities and women comprised 69% of all newly hired employees. During that same period, minorities and women also earned 55% of all promotions.
>
> Texaco has also instituted a five-year, $1 billion plan to increase relationships with businesses owned by minorities and women. During the first 18 months of the plan, Texaco's expenditures with minority and women owned businesses totaled $404 million, exceeding their goal for this period by 35%.
>
> "Respect for the individual," one of Texaco's 10 core values, is at the forefront of all of the company's initiatives.

Texaco is expressing its opinion that diversity is important, while also mentioning certain of its business policies and practices that are emblematic of its commitment to diversity. There is, however, no suggestion that consumers should buy Texaco's gasoline or other products. Yet, because the advertisement includes facts about Texaco's business practices, under the decision below, the speech in this advertisement leaves Texaco open to the possibility of defending a lawsuit under the UCL and False Advertising Statute. For example, a California citizen could allege that the statement that Texaco thinks diversity is important is misleading because Texaco has been the object of complaints of discrimination.[8]

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8. Other companies similarly could be at risk for promoting their own "good works" programs. *See* ExxonMobil print advertisement, "A responsible path forward on climate," Lodging at L-10 (promoting its alliance with the Global Climate and Energy Project); Johnson & Johnson television advertisement, "Support of Children," Lodging at L-11 (promoting its projects that concern the health and welfare of children); Dawn television advertisement, "Duck's Life Saved From Oil Spill," Lodging at L-12 (promoting its assistance to animals harmed by the environment and related initiatives); Dawn print advertisement, "Mallard Duck," Lodging at L-13 (same).

D. Public Debate Advertisements

During the national debates on health care, Aetna placed a print advertisement entitled "Fixing Health Care Isn't Exactly Brain Surgery. (If Only It Were That Easy.)"[9] Lodging at L-14. Aetna begins by candidly speaking about the politics of healthcare, and sharing its opinion as to what is most important:

> About the only aspect of the health care debate any two people might agree on is that the system needs work. Some might say considerable work. That said, we'd like to weigh in with a few ideas of our own since we're actually in the position to do something about it. First of all, the paramount focus of health care must be quality.

Aetna then enumerates its "ideas" and makes the following statements:

> [W]e send timely reminders that encourage members to see their doctors for immunizations to prevent illness and to get screenings that help physicians diagnose disease early enough to do something about it. If at first they don't respond, we remind and remind again. Just one result is a significant reduction in late-stage breast cancer.
>
> [W]e've created outreach efforts that have reduced asthma emergencies 60%, promoted eyesight-saving laser therapy for diabetics and improved the quality of life for people with congestive heart failure.

Aetna is clearly presenting its political views on the health care debate to the public. Like any individual, Aetna has a right to be heard. Because the advertisement also contains factual statements about Aetna's business practices and their effects, however, this advertisement could be actionable commercial speech in the eyes of the California Supreme Court. As a result,

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9. Aetna was not alone in entering the health care debate. *See*, *e.g.*, Blue Cross Blue Shield Pennsylvania television advertisement, "Health Care Reform," Lodging at L-15.

important opinions about critical issues of the day that should be heard by the citizenry will be chilled.[10]

E. The *Kasky* Decision May Lead To A Major Chilling Of Speech If This Court Does Not Reverse The Decision Below And Clarify The First Amendment Protection Of Corporate Speech

Near the end of its opinion, the California Supreme Court maintains that "speech represent[ing] expression of opinion or points of view on general policy questions . . . is noncommercial speech subject to full First Amendment Protection." *Kasky*, 27 Cal. 4th at 967. Amici, of course, agree with this statement. However, this statement is belied by the court's conclusion that "product references" transform noncommercial speech into commercial speech. The court explained its understanding of "product references" as follows:

> [W]e understand 'product references' to include . . . for example, statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product. Similarly, references to services would include not only statements about the price, availability, and quality of the services themselves, but also, for example, statements about the education, experience, and qualifications of the persons providing or endorsing the services.

Id. at 961 (citation omitted).

The California Supreme Court concedes that this definition is "broad." Its justification for casting such a wide net is the

10. Likewise, other companies who encourage the promotion of certain positions will be silenced. *See*, *e.g.,* Mobil print advertisement, "Climate change: a degree of uncertainty," Lodging at L-16 (advertisement encouraging officials in Kyoto gathered to discuss the environment to "commit themselves to meaningful actions" and specifying what those actions should be).

need "to adequately categorize statements made in the context of a modern, sophisticated public relations campaign intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller." *Id.* at 961-62. However, a company's "image" is not product information that should be classified as commercial speech because there is no risk of *commercial harm* to the consumer. *See*, *e.g.*, *Bolger*, 463 U.S. at 81 (Stevens, J., concurring) ("The interest in protecting consumers from *commercial harm* justifies a requirement that advertising be truthful") (emphasis added).[11] Because all corporate speech contributes in some way to a company's image, if the California court's decision prevails it will be virtually impossible for corporate speech to *ever* be deemed fully protected noncommercial speech.

Consider, for example, if an automobile manufacturer broadcasts a commercial asking the public to "Buckle Up For Safety!" and the advertisement prominently displayed the automobile manufacturer's logo. This advertisement is clearly meant to improve the image of the automobile manufacturer by portraying it as a corporate citizen concerned about safety. However, one can imagine a California resident arguing that an implied message of this advertisement is that "although we sell cars, we care about people." Because this advertisement attempts to persuade consumers that the automobile manufacturer is a "good company," it could fall within the California Supreme Court's definition of commercial speech. If the California statutes are indeed so far-reaching as to include this type of speech as commercial speech, messages that are of import to the public, such as "everyone should wear seatbelts," will not be heard.

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11. In *Bolger*, the Court was specifically concerned that references to public issues in advertisements "should not be permitted to immunize false or misleading product information from government regulation." 463 U.S. at 68. In the present case, the California Supreme Court is attempting to regulate advertisements that have no mention of "product information," and *only* references to public issues.

The California Supreme Court has placed the definition of commercial speech on a runaway train. The decision ignores the *Virginia State Board of Pharmacy* holding that commercial speech is speech that "does nothing more than propose[] a commercial transaction" and instead has defined commercial speech to include virtually every corporate utterance. *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (*quoting Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

It is time for this Court to clear any such confusion and return to the roots of its commercial speech jurisprudence. In keeping with *Virginia State Board of Pharmacy*, commercial speech should be understood to only include speech that refers to the price or the quality of the product being sold; where no specific item is being sold, the speech should not be considered commercial speech.[12] Commercial speech "inform[s] the public of the availability, nature and prices of products and services." *Bates v. State Bar*, 433 U.S. 350, 364 (1977). Companies themselves should not be considered the "product" for commercial speech purposes. The consumer's concern is about the price of the product and whether the product works as it should. To the extent that a consumer brings his or her own political views about the company into purchasing decisions, the consumer is taking the purchase out of the realm of commercial speech and into the realm of political, noncommercial speech. To the extent corporations make representations about their political views and practices, that speech is political, noncommercial speech, as well.

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12. If an advertisement contains both commercial and noncommercial speech, the clearly noncommercial speech should be sifted out. If the residual speech does not propose a commercial transaction, the advertising should not be considered commercial speech.

III. Even If Nike's Speech Is Deemed Commercial Speech, Under The Proper Application Of *Central Hudson*, This Court Should Reverse The California Supreme Court

As the Court recently explained in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001), "[f]or over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment. Instead, the Court has afforded commercial speech a measure of First Amendment protection 'commensurate' with its position in relation to other constitutionally guaranteed expression." (citations omitted). In *Central Hudson* and its progeny, the Court affirmed its commitment to uninhibited, robust and wide-open debate and developed the well-known four-pronged test to determine whether a particular restriction of commercial speech does not violate the First Amendment. 447 U.S. at 566; *Rubin*, 514 U.S. at 489; *Edenfield*, 507 U.S. at 767.

It has long been clear that, while *some* types of speech may receive substantial, but lesser protection—*e.g.*, speech that merely proposes a commercial transaction (*see Va. State Bd. of Pharmacy*, 425 U.S. at 765)—other types of speech, such as the Nike statements, are entitled to full First Amendment protection.[13] Indeed, it is inconceivable that the correct application of *Central Hudson* would stop Nike (or any person or other corporation) from safely responding to charges made against it of unfair labor or other practices without fear of litigation.

The California Supreme Court's decision disregards the constitutional values embraced in *Central Hudson* and the commercial speech cases decided by this Court since 1980. Simply put, the overbroad reach of the California statutes is more extensive than is necessary to serve the government's

13. To the extent that any speaker's statements are found to be "component parts of a single speech" that contains inextricably intertwined commercial and noncommercial elements, all of the speech is entitled to full First Amendment protection. *See Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 796 (1988).

purported interest in protecting consumers and thus fails *Central Hudson's* fourth prong and violates the First Amendment.

Some members of the Court have questioned whether the *Central Hudson* test should be applied to commercial speech at all. *See*, *e.g.*, *44 Liquormart*, 517 U.S. at 517 (Scalia, J. concurring in part and concurring in judgment); *id.* at 523 (Thomas, J. concurring in part and concurring in judgment).[14] Other members of the Court have found the application of balancing tests to the First Amendment to be problematic. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring) ("the use of … traditional legal categories is preferable to the sort of ad hoc balancing that the Court" performs in First Amendment cases); *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J. concurring) ("[F]airly precise rules are better than more discretionary and more subjective balancing tests."). Amici share these concerns, although they believe that the correct analysis of *Central Hudson* and its progeny would have protected Nike's speech. At the very least this Court should reaffirm *Central Hudson*. But Amici urge the Court to take this opportunity to go beyond *Central Hudson* and find that the strict scrutiny standard should be applied to commercial speech when challenged by a private citizen where no individual harm is alleged.

The present case presents a situation never previously before this Court: a private person has brought an action seeking relief as a result of a corporation's alleged false and misleading speech, in which he has no showing of harm. This is not a case, such as those involving the government or a regulatory agency, which, in the commercial speech area, warrants the intermediate scrutiny of the *Central Hudson* test. Rather, strict scrutiny should

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14. In fact, Justices Scalia and Thomas have found historical evidence submitted in other cases by Amici to support the notion that commercial speech is entitled full First Amendment protection. *See 44 Liquormart, Inc.*, 517 U.S. at 517 (Scalia, J., concurring); *id.* at 522 (Thomas, J., concurring).

be applied in private suits where there is no allegation of harm, such as in *Kasky*.

A strict scrutiny test will find a speech statute fatally flawed if there are alternative means of dealing with the false speech. *See Lorillard*, 533 U.S. at 582 ("Under strict scrutiny, the advertising ban may be saved only if it is narrowly tailored to promote a compelling government interest") (citation omitted). Citizens, consumer groups and corporations have many different ways of correcting speech they feel to be false. Indeed, many of those methods, such as boycotts and advertisements, have been used against Nike. Moreover, the substantial state interest that the state has in regulatory cases where the public may be harmed is lacking where corporate speech is attacked and the only conceivable harm is if the public is influenced to have a more positive view of the company as a result of that speech. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In this case, the California court seeks to impose strict liability on the corporate speaker irrespective of its intention. The Chairman of the Board, its counsel, and any corporate employee who speaks out in the public debate, no matter how well meaning, speak at their own risk. Even if they believe it to be true and are relying on reports (such as the Andrew Young report in this case), they cannot utter a word without fear of suit. But a well intentioned speaker whose speech concerns material other than product quality or price should not be held liable in a private action and thus the California Supreme Court should be reversed.

IV. The California Statutes Are Unconstitutional As Applied Because They Are Vague And Overbroad And Allow A Private Party To Sue Without Any Showing Of Harm

California's UCL and False Advertising Statute, as applied by the court below, are unconstitutionally overbroad and vague. The statutes, with few procedural limitations, make it unlawful for any person or corporation to make false

or misleading statements in advertising.[15] Indeed, under these statutes, a private citizen of California can bring an action seeking injunctive relief, disgorgement of all monies obtained through the challenged advertising and an order compelling placement of corrective advertising, all without even alleging that he or she was individually harmed. *See Kasky*, 27 Cal. 4th at 949-51. No other state has gone this far.

A. The Statutes Are Unconstitutionally Overbroad

A constitutional challenge of overbreadth requires a showing that the statute is susceptible of sweeping and improper application affecting protected speech in general. *See Bigelow*, 421 U.S. at 815-817. Because private citizens can bring their own actions under the UCL and False Advertising Statute without alleging harm, there are no state or federal agencies in place to insure that litigation brought pursuant to these statutes is being brought only in connection with actionable commercial speech. Moreover, the potential remedies allowed under the statutes are severe. They include requiring the advertiser to wage a "corrective" advertising campaign against itself. This Court has found that a similar remedy with respect to political and electoral coverage in the press was unconstitutional under the First Amendment. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (holding unconstitutional a statute that required newspapers to publish replies to criticism of political candidates).

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15. § 17200 defines unfair competition as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . . ." § 17500 makes it unlawful

> for any person, firm corporation or association . . . to make or disseminate or cause to be made or disseminated before the public in this state . . . or . . . from this state before the public in any state . . . any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . .

In *New York Times*, this Court found an Alabama libel law that had similar chilling effects unconstitutional because that law deterred critics of government officials from voicing their criticism in fear of having to incur the expense and responsibility of proving the truth of their statements in court. 376 U.S. 254. The Court explained that such a law resulted in people making "only statements which 'steer far wider of the unlawful zone' … [which] dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *Id.* at 279 (*quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

Importantly, this Court has held that "the burden and expense of litigating the issue . . . would unduly impinge on the exercise of the constitutional rights. '[T]he free dissemination of ideas [might] be the loser.'" *Bellotti*, 435 U.S. at 785 n.21 (*quoting Smith v. California*, 361 U.S. 147, 151 (1959)). That the prospect of time-consuming and financially-draining litigation in and of itself impermissibly chills protected speech is not to be taken lightly. *See*, *e.g.*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971). In the present case, although Nike is a large corporation with considerable assets, it may find the cost of defending itself so onerous as to force it to resort to self-censorship. A smaller company, brought to court at the whim of a California citizen, may suffer even greater injury and be forced out of business completely in the face of such litigation.

Because almost any national advertisement reaches the citizens of California—the most populated state in the nation—it is virtually impossible for advertisers and their agencies to immunize themselves from the chilling effects of California's statutes when engaging in a nationwide advertising campaign. The reach of these statutes is not just limited to advertising that is published in California; the statutes also apply to advertising that is disseminated by California citizens and published in other states, regardless of whether those other states have their own false advertising

laws that would not allow a similar action. The chilling effects of these statutes is real and will be felt by Amici and its members. Advertising agencies and their clients throughout the country will be uncertain as to what speech in advertising could be challenged, and thus will have to engage in self-censorship in fear of protracted litigation brought by citizens of California invoking the UCL and the False Advertising Statute

B. The Statutes Are Unconstitutionally Vague

The interpretation of the UCL and the False Advertising Statute as applied by the court below to Nike's speech only increases the chilling effects that these statutes have on protected speech in advertising. *See Bigelow*, 421 U.S. at 815-18 (a challenge of a statute on First Amendment grounds can be brought both on overbreadth grounds generally as well as on the ground that as applied it infringes on appellant's constitutionally protected speech). As the California Supreme Court notes in its decision below, to state a claim under these statutes, a party need only show that members of the public are likely to be deceived by the advertising. *Kasky*, 27 Cal. 4th at 950-51 (*citing Leoni v. State Bar*, 39 Cal. 3d 609, 626 (1985)). Such an interpretation of the requirements of these statutes is unconstitutionally vague.

As this Court has held, a statute is unconstitutionally vague where the line between proscribed and non-proscribed conduct is so ambiguous that its effect is to inhibit persons from engaging in constitutionally protected conduct. *See NAACP v. Button*, 371 U.S. 415, 417-18 (1967). Under the California statutes, the line between speech that is likely to deceive the public and speech that is not likely to deceive the public (the conduct at issue), is beyond vague, it is completely undefined. This puts advertisers in the untenable position of having to be clairvoyant in order to determine what speech the public would likely find deceptive. Such a vague prohibition can lead to extraordinary applications. As Justice Brown in her dissent below explained, "[t]his

broad definition of actionable speech puts a corporation 'at the mercy of the varied understanding of [its] hearers and consequently of whatever inference may be drawn as to [its] intent and meaning.'" *Kasky*, 27 Cal. 4th at 985 (Brown, J., dissenting) (*quoting Thomas v. Collins*, 323 U.S. 535).

C. The Statutes' Failure To Require Harm Is Unconstitutional

The UCL and False Advertising Statute do not require a showing of harm—personal, actual, or even imminent. This is inconsistent with this Court's First Amendment jurisprudence, which is in accord with the notion that a speaker whose speech causes no actual harm should not face any consequences for his or her words. *See Brandenburg*, 395 U.S. at 449 (distinguishing "advocacy" from "incitement to imminent lawless action"). Amazingly, the California court denied Nike its First Amendment rights based on statements that do not concern the inherent qualities of the product and that are not likely to harm consumers in any way. In this case, abstract harms have been allowed to trump real freedoms. Indeed, any harm any consumer might suffer as a result of Nike's speech is unrelated to the composition or quality of the product Nike sells. Nevertheless, the California court seems to believe that such a complaint justifies moving the globalization debate out of a public political forum and into a courtroom.

D. The Statutes Lack The Procedural Safeguards Found In Federal Legislation

Serving the same purpose of protecting consumers, federal legislation has procedural safeguards in place that avoid the unconstitutional shortcomings of the California statues. In order to bring a claim for false or misleading advertising under the Lanham Act (15 U.S.C. § 1125(a)), a plaintiff must demonstrate that it has suffered, or is likely to suffer, commercial or competitive injury as a result of the advertising. *See, e.g.*, *Johnson & Johnson v. Carter-Wallace*,

Inc., 631 F.2d 186, 190 (2d Cir. 1980). As a rule, consumers do not have standing to bring a claim for false or misleading advertising under the Lanham Act, because they do not have a commercial stake in the outcome. *See*, *e.g.*, *Ford v. Nylcare Health Plans of the Gulf Coast*, *Inc.*, 301 F.3d 329, 338 (5th Cir. 2002); *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1179 (3d Cir. 1993); *see also Barrus v. Sylvania*, 55 F.3d 468 (9th Cir. 1995).

Similarly, the Federal Trade Commission ("FTC") has the power to regulate unfair competitive practices, and may not only seek injunctive relief in the courts, but also commence litigation in federal or state court seeking damages on behalf of competitors or consumers who have been harmed by false or misleading advertising. 15 U.S.C. § 57b. As with the Lanham Act, there is no private right to sue under the FTC Act (15 U.S.C. § 45, *et seq.*). *See* 4 J. Thomas McCarthy, McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:119 (2002). It is only the FTC, as a federal agency, that is empowered once there has been a showing of damage, to take action concerning violations of the FTC Act.

By requiring that the plaintiff allege an injury and by not allowing just any private citizen to bring a claim, the Lanham Act and the FTC Act avoid some of the pitfalls of the California UCL and the False Advertising Statute, which have created an overbroad regime that has advertisers and their clients self-censoring protected First Amendment speech in fear of suits being brought by disgruntled consumers.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

The ANA is the industry's premier trade association dedicated exclusively to marketing and brand building. Representing more than 300 companies with 8,000 brands that collectively spend over $100 billion in marketing communications and advertising, the ANA's members market products and services to consumers and businesses. ANA serves the needs of its members by providing marketing and advertising industry leadership in traditional and e-marketing, legislative advocacy, information resources, professional development and industry-wide networking.

The AAF is a national trade association that represents virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include approximately 200 local professional advertising associations with 45,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use virtually all forms of media to advertise and communicate with consumers throughout the United States.

The AAAA, founded in 1917, is the national trade association representing the American advertising agency business. Its nearly 500 members, comprised of large multi-national agencies and hundreds of small and mid-sized agencies, maintain 2,000 offices throughout the country. Together, AAAA member advertising agencies account for nearly 80 percent of all national, regional and local advertising placed by agencies in newspapers, magazines, radio and television in the United States. AAAA is dedicated to the preservation of a robust free market in the communication of commercial and noncommercial ideas.