No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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November 15, 2002

MOTION FOR LEAVE TO FILE
BRIEF OF AMICUS CURIAE

The Center for Individual Freedom respectfully moves for leave to file the following *amicus curiae* brief in support of the petition for certiorari. Petitioners have consented to the filing of this brief. Respondent has refused consent.

The interest of the Center in this case arises from its central organizational mission to promote individual freedoms and its especially strong concern with the freedoms protected by the First Amendment. The Center has a long-term interest in the selection and resolution of important First Amendment cases by this Court and regularly files briefs in such cases. *See, e.g.*, Brief of *Amicus Curiae* Center for Individual Freedom in Support of Petitioners, *Watchtower Bible and Tract Society of New York* v. *Village of Stratton*, No. 00-1737 (Nov. 29, 2001); Brief of *Amici Curiae* Center for Individual Freedom, *et al.*, in Support of Petitioners, *Zelman* v. *Simmons-Harris*, No. 001751 (Nov. 9, 2001); Brief of *Amicus Curiae* Center for Individual Freedom in Support of Respondent, *United States* v. *United Foods*, No. 00-276 (Mar. 8, 2001).

This brief will discuss the national burden on free speech imposed by the decision below, the ongoing and irreparable nature of that burden, and hence the need for prompt review of the questions presented by the petition.

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Dated: November 15, 2002.

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INTEREST OF AMICUS CURIAE[1]

The Center for Individual Freedom is a nonprofit organization with the mission to investigate, explore, and communicate in all areas of individual freedom and individual rights, including, but not limited to, free speech rights, property rights, privacy rights, the right to bear arms, freedom of association, and religious freedoms. Of particular importance to the Center 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 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. The liability regime sanctioned below burdens a vast range of speech deemed commercial by the California Supreme Court and makes that burden especially noxious by eliminating traditional procedural, substantive, and territorial limits that would otherwise constrain the impact of the speech restrictions. The absence of such safeguards not only directly burdens speech subject to the regime, it also generates tremendous uncertainty even for speakers not properly covered by the regime and escalates the penalty for a speaker's incorrect assessment of non-coverage or non-liability. The resulting direct suppression and indirect chill of important public debate constitute irreparable injuries to First Amendment freedoms for so long as the decision below remains intact. As with the justifications for prompt action within a single case involving preliminary injunctions or interlocutory appeals on immunity defenses, the irreparable injury that will be caused by the decision below calls for prompt Supreme Court review of even the earliest case in the certiorari process. This Court thus should grant the pending petition rather than wait for any speculative and unlikely benefit from further percolation.

2. The overbroad definition of commercial speech in the decision below also multiplies the impact of the California liability regime and introduces tremendous uncertainty for business persons and entities regarding what speech is subject to regulation. Just as uncertainty regarding the law within its field of operation can chill protected speech not constitutionally subject to penalty, so too can uncertainty regarding the scope of the law chill protected speech beyond the law's intended or permissible target. Such uncertainty and suppression of speech arises from the mere existence of the decision below and the threat of claims regardless of their merits. The First Amendment confers immunity from such burdens and that immunity will be irreparably lost for numerous speakers unless this Court grants the current petition.

ARGUMENT

The California Supreme Court held that speech "directed by a commercial speaker to a commercial audience, and [that] made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products" constitutes "commercial speech for purposes of applying state laws barring false and misleading commercial messages." Pet. App. 1a. Based on its further view that "governments may entirely prohibit commercial speech that is false or misleading," *id*., the court upheld a California liability regime that lacks even a modicum of the procedural and substantive safeguards that have traditionally limited the First Amendment burdens imposed by various state causes of action.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CAUSES EXTRAORDINARY AND IRREPARABLE INJURY TO FIRST AMENDMENT RIGHTS NATIONWIDE.

This Court should grant the petition in this case because leaving the decision below intact will cause continuing irreparable injuries not just to petitioners, but to all business persons and corporations who do any business in California and to the public discourse throughout the nation.

While it is always the case that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976), the speech-regulating regime approved below will create uniquely burdensome and nationwide injuries to First Amendment freedoms. Applicable to great swaths of expression erroneously categorized as commercial speech, California's liability scheme also eliminates fundamental procedural, substantive, and territorial protections that have heretofore limited the burdens on speech imposed by more traditional causes of action.

The irreparable injuries generated by the decision below militate against waiting upon the wholly speculative possibil-

ity of any useful percolation of the issues in other courts. There likely will be no such percolation given that no sane plaintiff would sue under the California law anywhere else but in California state courts, and no other states have adopted such aggressive regimes as California's for regulating speech. Furthermore, the injuries caused by the decision below will be continuous during any such delay and will not be mitigated by any more speech-protective rulings in other jurisdictions.

In somewhat analogous circumstances, this Court has recognized that certain potential burdens on protected rights are too severe to delay review of various immunity determinations until after final judgment. *See, e.g.*, *Mitchell* v. *Forsyth,* 472 U.S. 511, 526 (1985) (where immunity is predicated on "an entitlement not to stand trial or face the other burdens of litigation, * * * it is effectively lost if a case is erroneously permitted to go to trial" and an order denying immunity warrants an immediate appeal). The same principles justifying early interlocutory appeals of orders for denial of qualified immunity likewise favor this Court's review of cases denying constitutional immunities that will have a disproportionate or irreparable impact on the rights of potential future defendants.

In this case, the First Amendment rights at issue will be burdened not only by any continuing litigation in this case itself, they will be burdened for all potential speakers subject to suit under California law. And that burden will persist regardless of whether petitioners or defendants in other cases are eventually vindicated on the merits. Review of the questions presented here should be had at the earliest opportunity because delaying review will allow far too much damage to First Amendment freedoms during the intervening period.

A. 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 protected commercial and non-commercial 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.

To prevent such a crippling chill, First Amendment jurisprudence incorporates various due process protections in order 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).

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").

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).[2]

The absence of so many traditional procedural safeguards 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 protected speech and makes it exceptionally difficult to obtain pre-trial dismissal or summary

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

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 effects of having abandoned so many traditional limits on speech-suppressing suits are 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 will 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, as a substantive matter, may be regulated or prohibited without offending the First Amendment. *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").

The elimination of so many procedural safeguards thus vastly expands the suppression not only of speech targeted by the liability regime, but also of speech that is not covered – and that could not be covered – by California's restrictions. Such sweeping and irreparable injury to combined due process and First Amendment interests warrants this Court's prompt attention.

B. Speaker Discrimination

In addition to due process safeguards, the First Amendment incorporates Equal Protection principles in order to provide a check against distortion of the marketplace of ideas and to guard against abuse of minority or disfavored groups and 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); *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."). There is no material difference, in terms of the interests behind California's unfair competition law, between the speech by petitioners at issue in this case and the speech to which petitioners were responding. The anti-Nike criticisms were plainly targeted to consumers among others and were designed to influence their purchasing 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 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.[3] But the "inherent worth of the speech in terms of its capacity for informing the public," this Court explained, "does not depend upon the identity of its source, whether corporate, association, union, or individual." *Bellotti*, 435 U.S. at 777.

Aside from rendering the one-sided restrictions unconstitutional, such discrimination also highlights the immediate and continuing danger of declining to grant review in this case. 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 them-

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[3] The discrimination between speakers also undermines the alleged state interest supporting the law – that of fair competition and accurate information to consumers. *See Greater New Orleans Broadcasting*, 527 U.S. at 186-87 (questioning whether federal interests in discouraging gambling were even "substantial" where federal policy was "decidedly equivocal" and where Congress was unwilling "to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General").

selves against criticism from abortion opponents.) Allowing the California regime to remain in place while the issue percolates thus will impose a predictably anti-business bias to 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.

C. Extraterritorial Application

As with the intersection between the First Amendment and the Due Process and Equal Protection Clauses, there is likewise added concern where the First Amendment interfaces with the Commerce Clause through the imposition of extraterritorial restrictions on speech. Such concern not only requires heightened scrutiny of the extraterritorial speech restrictions in this case, it also increases the urgency of review by this Court.

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 transactions which take place across state lines, even if wholly outside the State").

Just as "extraterritorial regulation of interstate commerce" squarely conflicts with the Commerce Clause, *Healy*, 491 U.S. at 332, extraterritorial regulation of commercial speech conflicts with both the Commerce Clause and the First Amendment and thus imposes an especially aggressive constitutional affront. *Cf. Bigelow* v. *Virginia*, 421 U.S. 809, 828-29 (1975) (state restrictions affecting "a wide variety of national publications or interstate newspapers * * * would impair, perhaps severely, the[] proper functioning" of the press and the free exchange of ideas generally).

In this case, the effect of California's regime is to effectively regulate "commerce that takes place wholly outside of

the State's borders," *Healy*, 491 U.S. 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 any number of nationwide and global media. Any business wishing to communicate to the public anywhere in the country will thus have to do so on California's terms.

The Commerce Clause makes such regulation invalid "whether or not the commerce has effects within the State" and bars a State from adopting "legislation that has the practical effect of establishing" rules of conduct "'for use in other states.'" *Id*. (citation omitted). That such regulation would be invalid even as to purely economic activity necessarily establishes the invalidation of extraterritorial regulation operating in the constitutionally protected realm of speech.[4]

While legal error confined to a single jurisdiction may be tolerable while this Court awaits further development of the law in other courts, a decision with nationwide impact drastically alters the balance between this Court's institutional interests and the public and private burdens imposed by that decision. The balance in this case warrants prompt review of the California Supreme Court's broadly encroaching decision rather than the deferral of consideration until some later date.

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[4] That the speech targeted by the California regulatory regime is supposedly unprotected when false and misleading does not drop this case back to a standard Commerce Clause analysis because the regime still impacts, directly and indirectly, substantial amounts of speech that would be found entirely lawful in a suit on the merits. Furthermore, much of the supposedly misleading speech regulated by California law would be unregulated – and hence constitutionally protected – under the laws of other states. As petitioners pointed out, California's liability regime is unique throughout the country for its depth and breadth of regulation. Pet. 29.

II. THE PETITION PRESENTS IMPORTANT QUESTIONS REGARDING THE SUBSTANTIVE REACH OF THE COMMERCIAL SPEECH DOCTRINE.

The danger to protected expression, and hence the need for this Court's prompt review, is further demonstrated by the overbroad and uncertainly applied definition of commercial speech adopted by the court below. That definition 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. Such breadth of direct regulation and chilling effect elevates the national importance of the questions presented and the adverse consequences of denying review. It thus strongly favors granting the present petition.

The California Supreme Court's categorization 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 would seem to encompass 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 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 poses an exceptional threat to speech both within and anywhere in the ballpark of the boundaries of California's liability regime. That threat provides an important reason to grant the petition for certiorari.

Finally, this case also could provide an opportunity to clarify the scope of the commercial speech doctrine in a manner that might alleviate much of the ongoing controversy and disagreement on the issue. Many of the disputes plaguing the commercial speech doctrine in recent years could be attributable, at least in part, to problems regarding the scope of the doctrine. If diligently confined to its core object of "speech that does no more than propose a commercial transaction." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001), the doctrine would cause less friction. So limited to speech that is "'linked inextricably' with the commercial arrangement that it proposes," *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993) (citation omitted), the commercial speech doctrine effectively becomes a special application of the *O'Brien* test

for regulations of conduct that create incidental burdens on speech. *See United States* v. *O'Brien,* 391 U.S. 367 (1968).[5]

An alternative means of confining the commercial speech doctrine to a less troubling and troublesome field of operation 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. For example, speech involving publicly debated issues, commercial or otherwise, plainly makes a "direct contribution to the interchange of ideas," *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 780 (1976), and thus should be clearly excluded from the doctrine. Similarly, given the ongoing public and legislative concerns 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 publicly visible companies, like discussions of public figures in general, are far more likely to involve broader public issues and thus restrictions are more likely to interfere with robust public debate.

Overall, the decision below has created and will sustain an extensive and irreparable burden on speech until this Court acts to pare it back. Postponing review adds little value to the eventual process but costs the public much in injury to public discussion of important and recurring issues. Granting certiorari now can forestall such consequences and provide this Court with an opportunity to address and resolve problems with the commercial speech doctrine in general.

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[5] And while aspects of the commercial speech doctrine remain inappropriate for addressing restrictions even on a narrowed category of commercial speech, the disagreement caused by the current doctrine can at least be substantially mitigated by confining it to a limited area.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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