No. 02-575

In the Supreme Court of the United States

OCTOBER TERM, 2002

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of California

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

KENNETH W. STARR
Counsel of Record
RICHARD A. CORDRAY
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

February 28, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of more than three million businesses of every size, in every sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business.[1]

The Chamber and its members have a strong interest in this case because the California Supreme Court significantly curtailed the freedom of speech by holding that most speech by businesses is "commercial speech" subject to reduced First Amendment protection. Just as petitioner Nike, Inc., discussed its overseas labor practices in the statements at issue in this case, so too do other businesses frequently discuss various aspects of their own operations in the course of ongoing public policy debates. Indeed, those topics about which individual businesses are best informed and have the most to contribute to the public debate are often precisely the subjects for discussion that would be curtailed by the ruling below.

Under the California Supreme Court's decision, all such speech on topics of public concern could be subjected to the reduced First Amendment protection accorded "commercial speech," and corporations could be held strictly liable for any factual misstatements mistakenly made in the course of public policy debates. The effect of the ruling below is thus

---

[1] Pursuant to Supreme Court Rule 37.6, the *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief; pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been filed with the Clerk.

to suppress corporations' speech and discriminate against them by holding that speech by corporations on important public policy matters is subject to the reduced protection accorded "commercial speech," but speech by their opponents is not. And this disparate and unfair treatment is not limited to speech in California. Because corporations' speech is increasingly disseminated on a nationwide and even worldwide basis, the decision below would threaten not only speech in California, but also speech elsewhere across the globe. Therefore, the Chamber urges reversal of the California Supreme Court's decision.

SUMMARY OF ARGUMENT

For many years, the Court has sent conflicting signals on the definition of "commercial speech" and has allowed the lower courts to take divergent approaches on this issue. In this case, the California Supreme Court used that latitude to create yet another test for determining whether speech is "commercial," one that is both breathtakingly broad and deeply menacing to our system of free expression. According to that court, "commercial speech" includes all statements of fact: (i) by persons engaged in commerce (including all businesses); (ii) to an audience including actual or potential purchasers of their products (which, in the case of a company like Nike, include almost all Americans); (iii) on commercial matters (which include nearly all matters on which corporations have any reason to speak). *See* Pet. 17a-20a.

Whatever the correct test may be, this surely is not it. From its inception, the "commercial speech" doctrine was designed to *broaden* the First Amendment's reach by granting limited protection to product advertisements that were previously held to be entirely unprotected. In sharp contrast, the California Supreme Court has now employed the "commercial speech" doctrine to *restrict* the First Amendment's protections by subjecting speech at the core of the First Amendment — including speech on important pub-

lic policy matters such as globalization, environmentalism, escalating health care costs, and so on — to the reduced level of protection accorded "commercial" speech. This makes no sense. As this Court explained long ago, speech about business operations and labor conditions is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

The California court's analysis points powerfully to the need to clarify the definition of "commercial speech." In particular, the Court has often stated that this doctrine properly addresses only the advertising of products and services for sale, rather than all speech by corporations. The Court should clearly reaffirm this approach. Otherwise, speech that lies at the core of the First Amendment would be relegated to its periphery. If general discussion about a company's business operations and labor conditions were subjected to the same kind of restrictions that apply to speech proposing a commercial transaction, the predictable result would be to impede and impoverish public debate on important policy issues.

This Court's authoritative guidance on the definition of "commercial speech" is much needed by the entire business community. As matters stand, this longstanding uncertainty regarding the definition and treatment of commercial speech, exacerbated by the California Supreme Court's decision, threatens to chill speech on important public policy matters. That should not be. Moreover, the increasingly nationwide and even worldwide scope of corporate speech means that corporations are effectively bound by the law that applies in the least protective jurisdiction. As a result, this Court can no longer afford to defer this issue yet again and should take this opportunity to clarify that restrictions on commercial speech are inapplicable to corporate speech on matters of public concern.

ARGUMENT

I. AFFIRMANCE OF THE RULING BELOW WOULD RESULT IN THE IMMEDIATE AND NATIONWIDE SUPPRESSION OF SPEECH ON IMPORTANT PUBLIC POLICY ISSUES.

A. The Court's Precedents Have Generated Substantial Uncertainty And Confusion Regarding The Definition Of "Commercial Speech."

In its prior commercial speech cases, the Court has set out at least three different tests for determining whether speech is in fact "commercial." The Court has "usually defined" commercial speech as "speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *accord Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). At times, however, the Court has applied a more expansive test, under which "expression related solely to the economic interests of the speaker and its audience" is treated as "commercial." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). And the Court has articulated yet another test, which considers three factors: whether the communication was an advertisement, whether it referred to a specific product or service, and whether the speaker had an economic motivation for the speech. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). Puzzlingly, under this last test, speech is not necessarily commercial even if all three factors are met, and speech can be commercial even if all three factors are not met. *See id.* at 67 & n.14.

The Court itself has acknowledged the inconsistency and indeterminacy of these and other precedents in this area. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993). The Court, however, has thus far

chosen not to resolve this inconsistency or to give clearer guidance on these points. *See, e.g., United Foods*, 533 U.S. at 410; *Discovery Network*, 507 U.S. at 416.

As commentators have noted, this Court's "attempts to define 'commercial' speech" are "more *ad hoc* than the source of any real guidance." Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 831-32 (1999); *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 5 (2000) (noting that the "boundaries" of the commercial speech doctrine are "quite blurred"). In light of this continuing uncertainty, lower courts have either adopted one of the various tests set out by this Court, or simply formulated one of their own.

In this case, the California Supreme Court took the latter approach and held that "commercial speech" includes all statements of fact: (i) by persons engaged in commerce; (ii) to an audience including actual or potential purchasers of their products; (iii) on commercial matters. *See* Pet. 17a-20a.[2] Although the California Supreme Court represented that this test was consistent with this Court's "commercial speech" jurisprudence, the test bears only the most superficial relationship to the *Central Hudson* definition of commercial speech as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. It thus well illustrates the Seventh Circuit's concern about "the incredible breadth of the *Central Hudson* test if taken to its literal extremes." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998). The test adopted below also seems to

---

[2] Remarkably, the California Supreme Court suggested that its novel test applies only for some purposes, and that some other unspecified test might apply in other cases. *See* Pet. 17a. It thus not only added a new "commercial speech" test to the jurisprudential mix, but signaled the future proliferation of even more tests.

draw on the broad discussion in *Bolger* of situations in which the speaker has an "economic motivation" for engaging in speech that relates in some more general way to its products and services. *See* 463 U.S. at 66-68. Indeed, the court below justified its broad formulation of the test for commercial speech by concluding that all discussion and debate about the business operations of a particular corporation constitute "product references" for purposes of the *Bolger* test. *See* Pet. 13a-15a, 18a-19a.

The California Supreme Court clearly recognized that the confusing and contradictory nature of this Court's case law provided it with the opportunity to venture out on its own and craft an entirely new definition of "commercial speech." It expressly quoted this Court's prior statements about "the difficulty of drawing bright lines" in dealing with commercial speech, Pet. 15a (quoting *Discovery Network*, 507 U.S. at 419), and that "the precise bounds of the category of" commercial speech are "subject to doubt," *id.* (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985)). As this case amply illustrates, the current muddled state of the law is emboldening lower courts to strike out on their own and fashion improperly broad definitions of what constitutes "commercial speech."

B. The Test For Commercial Speech Devised By The California Supreme Court Is Extreme, Unworkable, And Unprecedented.

Not only is the California Supreme Court's definition of "commercial speech" inconsistent with this Court's prior definitions, it also is inconsistent with this Court's First Amendment jurisprudence more generally. In particular, the ruling below denies full constitutional protection to virtually *all* speech by corporations on matters involving their business operations or labor conditions. Even where such speech touches on matters of acknowledged public concern, and even where it is tinged with direct political or legislative overtones, it will be entitled only to lesser protection.

If the California Supreme Court's decision is allowed to stand, the consequent vacuum that will occur in public discourse is undeniable. Matters relating to corporations' business operations and labor conditions constitute nearly all matters on which corporations have reason to speak. They also include the very matters on which corporate speakers are the best informed and thus best able to contribute to a meaningful discussion on issues of public concern. In this instance, Nike spoke generally about its business operations overseas, in the context of an ongoing public policy debate, without ever mentioning any of its products or services, much less offering any prices or terms of sale. *See* Pet. 3a-4a. Denuding the public square of corporations' involvement in robust debate would disserve the public by preventing a fair and complete treatment of most business issues.

Moreover, the California Supreme Court's test for commercial speech is seemingly not limited to speech by corporations. Indeed, any individual engaged in commerce who attempts to speak on commercial matters to an audience that includes actual or potential customers would be swept within its broad ambit. *See id.* at 17a-20a. Thus, lawyers who engage in an informative debate before a local business group on the topic of tort reform would be covered if their audience included any actual or potential clients. Doctors who speak to a local civic association on their concerns about rising malpractice rates and what could be done about them would be covered if the audience included any actual or potential patients. Any or all of the participants in such a public forum could be held strictly liable for any factual misstatements in the course of their discussion.

This breathtakingly broad test is clearly out of step with long-established First Amendment principles. Decades ago, the Court squarely held that self-interested speech "concerning the conditions in industry and the causes of labor disputes," much like the speech at issue here, is not only protected by the First Amendment, but is "indispensable

to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940). Other cases agree that speech relating to a corporation's business operations — especially speech relating to its labor conditions, like Nike's speech here — is fully protected. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-17 (1969); *Thomas v. Collins*, 323 U.S. 516, 531-32 (1945); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477-78 (1941).

In a number of other contexts, moreover, the Court has broadly emphasized the need to protect the publication of information on issues of "public concern," without excluding issues involving business operations and labor conditions. In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), for example, the Court permitted the publication of information, even though it had been illegally obtained, because it concerned important collective-bargaining negotiations that were pending at the time, and "negotiations over the proper level of compensation for teachers . . . were unquestionably a matter of public concern," *id.* at 535. Similarly, in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), the Court noted that allegations of illegality in the manner in which a franchising company's principal stockholder conducted his business likewise involved matters of public concern, and comments made about them were thus subject to heightened protection under the First Amendment, *see id.* at 775-78. Finally, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court reasoned that speech by a corporation on an upcoming referendum on taxes was "at the heart of the First Amendment's protection," *id.* at 776, and therefore applied strict scrutiny to, and ultimately struck down, a state law restricting corporate expenditures for such issue advocacy in election campaigns, *see id.* at 795. Like the speech in all of those cases, the speech at issue here informs the public about matters of public concern, and therefore should be fully protected.

Other cases supporting the proposition that speech about matters of public concern is fully protected are legion. *See, e.g., Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) ("commenting on matters of public concern" is one of the "classic forms of speech that lie at the heart of the First Amendment"); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (First Amendment protects against termination of government contract for solid waste disposal based on "speech on a matter of public concern," including county landfill rates); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 421 (1992) (Stevens, J., concurring) ("[s]peech about public officials or matters of public concern receives greater protection than speech about other topics"); *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8-9 (1986) (plurality opinion) (utility company's discussion with its customers of topics like energy conservation implicates "'matters of public concern' that the First Amendment both fully protects and implicitly encourages"). And the Court has repeatedly held that incorrect statements on matters of public concern, no less than correct ones, are protected, on the ground that errors are inevitable in such debates. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51-52 (1988); *Hepps*, 475 U.S. at 772-73; *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

As the Court has aptly observed, "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill*, 310 U.S. at 102. The ruling below is entirely out of harmony with this fundamental First Amendment principle. For this reason alone, the California Supreme Court's decision should be reversed.

C. The Test For Commercial Speech Applied Below Would Suppress A Broad Range Of Accepted And Beneficial Speech By Companies And Individuals.

Because the California Supreme Court significantly curtailed the freedom of speech by holding that most speech by businesses is "commercial speech" subject to reduced First Amendment protection, its holding should not be allowed to stand. Under the ruling below, speech on public policy matters such as labor, environmental, and economic issues involving a company's operations can readily be classified as mere "commercial speech." A substantial amount of protected speech is therefore jeopardized. Just as Nike discussed its overseas labor operations in the statements at issue in this case, other businesses frequently participate in the public debate by making statements about aspects of their corporate operations and corporate affairs. Indeed, this participation is often intimately connected with broader efforts to influence public policy through legislative or regulatory action. *See, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (publicity campaign conducted by railroads against truckers, which helped persuade governor to veto legislation, held not to violate antitrust laws, based in part on free speech concerns). For example:

- Energy companies, such as ChevronTexaco, express their views on whether or to what extent their operations cause or contribute to global climate change, and the role of their operations in any changes. *See, e.g.*, Statement on Global Climate Change, *at* www.chevrontexaco.com/social_responsibility/environment/global_climate.asp (last visited Feb. 27, 2003).
- Corporations involved in the United Space Alliance, which manufactured the Columbia for NASA's Shuttle program, publish updates on the investigation

currently underway into the recent tragedy. *See, e.g.*, Update on Investigation, *at* www.unitedspace-alliance.com/columbia/030207-1300.htm (last visited Feb. 27, 2003).

- Health care providers and drug manufacturers, such as Merck, discuss the causes of their rising health care and drug prices, and the form of regulation or deregulation that will best control those prices. *See, e.g.*, Remarks by Raymond V. Gilmartin, Chief Executives Club of Boston, *at* www.merck.com/newsroom/executive_speeches/011900.html (Jan. 19, 2000).

- Insurance companies, such as AIG and General Re, state their positions on the feasibility of providing terrorism insurance and the economic need for legislative action. *See, e.g.*, *Terrorism Insurance Still On Front Burner For Insurers, Lawmakers*, Ins. J., *at* www.insurancejournal.com/magazines/southcentral/2002/05/13/features/19079.htm (May 13, 2002).

- Automobile manufacturers, such as the Ford Motor Company, join the public debate over whether and to what extent automobile emissions cause pollution and health effects, and the costs and feasibility of requiring further reductions in automobile emissions. *See, e.g.*, Bill Ford's Speech to Greenpeace, *at* www.ford.com/en/ourCompany/environmentalInitiatives/environmentalActions/billFordsSpeechToGreenpeace.htm (Oct. 5, 2000).

- Manufacturers, such as General Electric, discuss the topic of environmental discharges and the effects that any discharges have had on rivers and other natural resources. *See, e.g.*, Statement on GE Hudson River Efforts, *at* www.ge.com/commitment/ehs/leadership/ehs_hudson_river.htm (last visited Feb. 27, 2003).

Under the California Supreme Court's decision, all of this speech could be subjected to the reduced First Amendment protection accorded "commercial speech," and corporations and their employees could be held strictly liable for any and all factual misstatements made in the course of heated and fast-moving debates. Such treatment marks a serious intrusion on the freedom of speech.

II. THE COURT SHOULD HOLD THAT THE "COMMERCIAL SPEECH" DOCTRINE ONLY ADDRESSES ADVERTISING OF PRODUCTS OR SERVICES OFFERED FOR SALE.

A. The History Of The "Commercial Speech" Doctrine Demonstrates That It Addresses Only The Advertising Of Products And Services, Not Speech By Corporations More Generally.

This case presents an especially useful vehicle for clearing up the widespread confusion about the definition of "commercial speech." While line-drawing in this area may be difficult in some respects, this case turns on an obvious line: only speech that in some way advertises the attributes of products or services for sale should be considered "commercial speech," and speech that merely relates to business operations or other matters of public concern should be accorded full First Amendment protection.

The history of the "commercial speech" doctrine strongly supports this distinction. The now-familiar doctrine was crafted to *grant* limited protection to product advertising, not to *limit* the protection already applied to other types of speech by corporations. Specifically, this Court developed the modern "commercial speech" doctrine in the 1970s in response to its earlier holding that "the Constitution imposes *no . . . restraint* on government as respects *purely commercial advertising*." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (emphasis added).

In *Virginia Board of Pharmacy*, the Court gave birth to the "commercial speech" doctrine by overruling *Valentine* and holding that "commercial speech, like other varieties, is protected." 425 U.S. at 770. In doing so, the Court could not have been clearer that by "commercial speech," it was referring only to the same kind of product advertisement at issue in *Valentine*:

> [T]he question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. *The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.*

Id. at 760-61 (emphasis added).[3] From its genesis, therefore, the "commercial speech" doctrine was designed to address speech that does *not* "editorialize on any subject," "report any particularly newsworthy fact," or "make generalized observations . . . about commercial matters." *Id.* Instead, it was designed only to provide some protection, albeit limited, to speech that does "*no more* than propose a commercial transaction." *Id.* at 762 (internal quotation omitted).

---

[3] In *Valentine*, an individual circulated a handbill that advertised his commercial exhibition of a submarine. After he was told he could not distribute such material under city law, he then reprinted the handbill, adding a protest of the city's wharfage policies on the back. The Court rejected the argument that the discussion on the back of the handbill constituted protected speech, but only because it found this discussion to be an intentional "sham" included solely for the purpose of evading the ordinance. *See Valentine*, 316 U.S. at 53-55.

The Court has never departed from this understanding. To the contrary, the Court has repeatedly recognized that the advertisement of products or services, as opposed to general discussion of business operations or other matters of public concern, is the *sine qua non* of "commercial speech." Thus, in the early years after *Virginia Board of Pharmacy*, the Court made clear that "commercial speech" is speech that "serves to inform the public of the availability, nature, and prices of products and services." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (referring to "commercial speech" as "commercial price and product advertising"). More recently, too, this Court has confirmed that "'[t]he entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression about *goods and services* and the right of government to regulate the sales of *such goods and services*.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion) (quoting Laurence H. Tribe, *American Constitutional Law* § 12-15, at 903 (2d ed. 1988)) (emphasis added and omitted).

In keeping with this established understanding of the commercial speech doctrine, this Court, in sharp contrast with the approach taken by the California Supreme Court, has "always been careful to distinguish commercial speech from speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). For example, while a manufacturer's speech about the attributes of a specific product is "commercial" regardless whether it is linked to a public debate, *see Bolger*, 463 U.S. at 67-68, an energy company's speech to its customers about energy conservation more generally is not, *see Pacific Gas*, 475 U.S. at 8-9 (plurality opinion). The latter speech "extends well beyond speech that proposes a business transaction . . . and includes the kind of discussion of 'matters of public concern'

that the First Amendment both fully protects and implicitly encourages." *Id.* (internal citations omitted).

B. Nike's Discussion Of Its Business Operations And Labor Practices Should Not Be Treated As "Commercial Speech."

Nike's speech in this case evidently addresses matters of public concern, and thus merits full First Amendment protection. Far from advertising the attributes of its shoes or other products, Nike was merely responding to public criticism relating to globalization — an issue that has recently been the subject of major protests worldwide, including here in the Nation's capital. Nike was not engaging in brand-name advertising containing representations about the quality or cost of its products, and indeed made no references to specific products or services at all. Accordingly, this speech is far removed from the advertising at issue in cases such as *Virginia Board of Pharmacy*.

To be sure, the California Supreme Court suggested that Nike's speech would not have qualified as "commercial speech" if Nike had discussed international labor issues generically without referring to specific facts about its own operations. *See* Pet. 26a. But that is no more plausible than requiring a lawyer to draft a brief without mentioning any of the facts in the case. Opinions naturally flow from facts, and are certainly more persuasive when they are grounded in facts. The public would in no wise benefit from a constitutional rule that encouraged Nike to assert conclusions without disclosing underlying facts. Under such a bizarre regime, the public would receive less information from Nike and would have less basis for undertaking an intelligent assessment of Nike's statements. As this Court has noted, "public debate must not only be unfettered; it must also be informed." *Bellotti*, 435 U.S. at 783 n.18 (internal quotation omitted).

The net effect of the California Supreme Court's rule would be to subject speech by businesses on important public

policy matters — but not competing speech by their opponents — to the reduced protection accorded "commercial speech." In this case, anti-globalization campaigners would be allowed to speak on an unqualified basis, but Nike's speech on the same issues would be restricted. In effect, this rule merely discriminates on the basis of the identity of the *speaker*, in violation of the well-established principle that the government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392; *see also Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."); *Pacific Gas*, 475 U.S. at 8 (noting that "[t]he identity of the speaker is not decisive in determining whether speech is protected" and adding that "[c]orporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster") (internal quotation omitted).

The principle that the government must remain neutral among speakers is but a corollary of the broader neutrality principle in First Amendment jurisprudence, which recognizes that there is "an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (quoting Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of The People* 27 (1948)). Thus, for example, the Court has long held that government regulations that discriminate on the basis of viewpoint are presumptively unconstitutional. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-12 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-30 (1995); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641-43 (1994); *R.A.V.*, 505 U.S. at 392.

Suppressing speech on a matter of public concern merely because the speaker is a corporation would run contrary to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *Sullivan*, 376 U.S. at 270. Because Nike's speech had no connection with the sale of specific goods or services, and did not even promote the attributes of its goods or services, it should not be treated as "commercial speech."

C. If Nike's Editorializing Is Found To Constitute "Commercial Speech," It Should Still Be Entitled To The Highest Constitutional Protection.

Even if this Court concludes that Nike's speech is "commercial," that should not be the end of the matter. In the past, this Court has "followed an uncertain course" not only as to the definition of "commercial speech," but also as to the level of protection to which "commercial speech" is entitled. *See Lorillard*, 533 U.S. at 574 (Thomas, J., concurring in part and concurring in judgment). In some cases, this Court has held that the "mere fact" that speech is commercial "does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress [it]." *44 Liquormart*, 517 U.S. at 501; *see also Discovery Network*, 507 U.S. at 424 (stressing that courts should not "place too much importance on the distinction between commercial and noncommercial speech"). But in other, mostly older cases, the Court has held the "commercial speech" label to be dispositive of the level of protection accorded the speech. *See, e.g.*, *Central Hudson*, 447 U.S. at 561-66.

In three of its most recent "commercial speech" cases, the Court has only added to the uncertainty. In *United Foods*, the Court noted that precedents which "accord less protection to commercial speech than to other expression" have "been subject to some criticism." 533 U.S. at 409-10 (citing opinions of Stevens and Thomas, JJ.). But the Court concluded that it "need not enter into the controversy"

because the restriction at issue in that case could not be upheld under any standard. *Id.* at 410.

In *Lorillard*, the Court recognized that a *majority* of the Justices have criticized *Central Hudson*, but again concluded that the restriction at issue failed even the *Central Hudson* standard:

> Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. *See, e.g.*, [*Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 197 (1999)] (Thomas, J., concurring in judgment); [*44 Liquormart*, 517 U.S. at 501, 510-14] (joint opinion of Stevens, Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment). But here, as in *Greater New Orleans*, we see "no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."

533 U.S. at 554-55; *see also id.* at 571 (Kennedy, J., concurring in part and concurring in judgment) (emphasizing that in view of the "obvious overbreadth" of the restriction at issue, the Court was not required to "consider whether *Central Hudson* should be retained in the face of the substantial objections that can be made to it"); *id.* at 575 (Thomas, J., concurring in part and concurring in judgment) (noting that "there is no philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech") (internal quotation omitted).

Most recently, in *Thompson v. Western States Medical Center*, 122 S. Ct. 1497 (2002), the Court expressly noted

that "several Members of the Court have expressed doubts about the *Central Hudson* analysis," *id.* at 1504. Again, however, the Court declined "to break new ground," in part because "[n]either party . . . challenged the appropriateness of applying the *Central Hudson* framework." *Id.*

The simplest way to resolve this case would be to hold that Nike's speech did not qualify as "commercial speech." If this Court were to conclude to the contrary, however, it should also take this opportunity to confirm that "commercial speech" is not invariably given a lower level of protection. At least where speech by corporations implicates important public policy matters, and does not even refer to the attributes of goods or services offered for sale, it should be afforded heightened protection. Such an approach would also be more consistent with the Court's assertion that the determination whether speech is "commercial" is "a matter of degree." *Discovery Network*, 507 U.S. at 423. Members of this Court have frequently suggested that it would be inappropriate to take an excessively rigid approach as to whether speech is "commercial" or not. *See Lorillard*, 533 U.S. at 575 (Thomas, J., concurring in part and concurring in judgment) (expressing "doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (commenting on the "artificiality of a rigid commercial/noncommercial distinction").

This case amply demonstrates the danger of automatically subjecting all "commercial" speech to lower protection. Under the California Supreme Court's approach, Nike's speech will be entitled to *no protection at all* if it is later determined to be inaccurate in any respect, and will be entitled only to very limited protection even if it were stated with complete accuracy. *See* Pet. 10a. Nor, as we have seen, are the implications of this case limited to Nike. As matters stand in California, most corporate speech may now be

treated as "commercial" speech. Companies in California are therefore faced with the undesirable choice of remaining quiet on important public policy debates, including those involving their own operations, or facing strict liability for any misstatements they may make in the context of heated and fast-moving debate. The latter risk is far from trivial: at least one other similar lawsuit has already been filed in California against eighteen national and international clothing suppliers and retailers. *See Union of Needletrades Indus. & Textile Employees, AFL-CIO v. The Gap, Inc.*, Cal. Super. Ct. No. 300474.

And the implications of the California Supreme Court's decision are not limited to the State of California alone. The increasingly widespread dissemination of corporate speech means that the law applied in the least protective jurisdiction effectively governs the national, and indeed worldwide, statements of thousands of corporations. If California aggressively punishes this kind of speech, then corporate speakers that do business in California will effectively be chilled from engaging in that speech at all.

The need to put an immediate halt to the California Supreme Court's effort to broaden the "commercial speech" doctrine is plain enough. And the need for the Court to offer more comprehensive guidance to the lower courts is equally plain. The currently prevalent uncertainty as to when speech will be treated as "commercial," and what level of protection "commercial" speech will receive, can only "inhibit the exercise of [First Amendment] freedoms" by "lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation omitted). The Court should take this opportunity to reconcile its confusing and contradictory precedents, and thereby bring much-needed clarification to this important corner of First Amendment law.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and remand for the case to be dismissed.

Respectfully submitted,

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

KENNETH W. STARR
Counsel of Record
RICHARD A. CORDRAY
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

February 28, 2003