No. 02-575

In the Supreme Court of the United States

NIKE, INC., ET AL., PETITIONERS

v.

MARC KASKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question, which is embraced within Question 2 of the petition for a writ of certiorari:

Whether the First Amendment, as applied to the States through the Fourteenth Amendment, permits a private party to seek redress for a company's allegedly false and misleading statements about the production of the goods that the company sells, if the private party himself did not rely on those statements, purchase the goods, or suffer any actual injury by reason of such reliance.

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INTEREST OF THE UNITED STATES

This case presents important questions respecting the relationship between the First Amendment and laws that prohibit commercial entities from making false statements in the marketplace respecting products and services. The United States, which enforces a variety of laws that are designed to prevent fraud and protect the public from injurious false statements, has a substantial interest in those questions.

STATEMENT

Respondent Marc Kasky, sued petitioners Nike, Inc., et al., in state superior court under the State of California's unfair competition laws. Cal. Bus. & Prof. Code §§ 17200 *et seq.* (West 1997). See First Amended Complaint (Compl.) paras. 1, 13.[1] Claiming no personal injury and, instead, pur-

[1] Respondent's first amended complaint is reprinted in petitioners' lodging on file with the Clerk of this Court.

porting to act on behalf of the general public, respondent alleged that Nike made false representations respecting the working conditions of those who manufactured Nike's products. *Id.* paras. 1, 8. Respondent sought injunctive relief, including disgorgement of monies that Nike allegedly acquired on account of those statements. Compl., Prayer for Relief para. 1. The superior court granted Nike's demurrer and dismissed the complaint. Pet. App. 80a-81a. The California Court of Appeal affirmed, holding that Nike's alleged misstatements were part of a public dialogue protected by the First Amendment. *Id.* at 66a-79a. The California Supreme Court reversed, holding that Nike's statements instead constituted "commercial speech" that is subject to state laws regulating false and misleading advertisements. *Id.* at 1a-65a.[2]

1. Nike is a well-known manufacturer and retailer of athletic shoes and apparel, with annual revenues in 1997 of $9.2 billion and annual advertising expenditures approximating $1 billion. Compl. paras. 1, 13. Most of Nike's products are manufactured by subcontractors located in China, Vietnam, and Indonesia, and most of the workers that make Nike products are women under the age of 24. *Id.* para. 21. In recent years, various persons and organizations have criticized the working conditions under which Nike products are manufactured in Asia. See, *e.g.*, *id.* para. 18.

Nike has entered into a memorandum of understanding with each of its subcontractors, pursuant to which the subcontractor assumes legal responsibility for ensuring compliance with applicable governmental regulations regarding minimum wages, overtime, health and safety, environmental hazards, and ensuring that workers making Nike products will not be put at risk of physical harm. Compl. para. 22 &

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[2] For purposes of this proceeding, the facts alleged in the complaint are assumed to be true.

Exh. O. In 1997, Nike commissioned an independent investigation of its Asian operations, headed by former U.S. Ambassador to the United Nations Andrew Young. *Id.* para. 55. Mr. Young formed a firm—"GoodWorks International"—to conduct the investigation, and the firm issued its report in July 1997. *Id.* paras. 55, 56.

2. In April 1998, respondent, a "resident of the City and County of San Francisco, California," Compl. para. 8, sued Nike for unfair and deceptive practices under California's unfair competition law "on behalf of the General Public of the State of California." *Id.* para. 1. Respondent charged that "in order to maintain and/or increase its sales," Nike made a number of "false statements and/or material omissions of fact" concerning the working conditions under which Nike products are manufactured. *Ibid.* In particular, respondent alleged that Nike made the following statements, which respondent contended were false and deceptive: (1) "workers who make NIKE products are protected from and not subjected to corporal punishment and/or sexual abuse," (2) "NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours," (3) "NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions," (4) "NIKE pays average line-workers double-the-minimum wage in Southeast Asia," (5) "workers who produce NIKE products receive free meals and health care," (6) "the GoodWorks International (Andrew Young) report proves that NIKE is doing a good job and 'operating morally,'" and (7) "NIKE guarantee[s] a 'living wage' for all workers who make NIKE products." *Ibid.*

Respondent affirmatively alleged that he suffered "no harm or damages whatsoever regarding himself individually" by reason of Nike's allegedly false and misleading statements. Compl. para. 8. Respondent nonetheless sought a preliminary and permanent injunction enjoining Nike from

"[m]isrepresenting the working conditions under which NIKE products are made," ordering the company to "undertake a Court-approved public information campaign to correct" any Nike statements that are found to be misleading or deceitful, and requiring Nike to "disgorge all monies" which Nike is found to have acquired by means of its unlawful and unfair business practices. Compl., Prayer for Relief para 1. Respondent also sought attorneys' fees and costs. *Ibid.*

3. Nike filed a demurrer to the complaint, contending that respondent's suit was barred by the First Amendment and the California Constitution. Following a hearing, the trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. Pet. App. 80a-81a. Respondent appealed, and the California Court of Appeal affirmed, holding that Nike's statements "form[ed] part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment." *Id.* at 79a.

4. The California Supreme Court reversed the superior court's judgment and remanded the case for further proceedings. The court held that Nike's statements constituted "commercial speech" and were therefore unprotected by the First Amendment from California's laws barring false and misleading commercial messages. The court concluded that they constituted commercial speech because they were "directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting the sales of its products." Pet. App. 1a.

The court explained that, in determining "whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the

message." Pet. App. 17a-18a (emphasis omitted). The court found that respondent's allegations in this case satisfied all three elements of its commercial speech test. First, the court found that Nike is a commercial speaker because the company manufactures, distributes and sells athletic shoes and apparel worldwide. *Id.* at 21a. Second, the court determined that Nike's statements were made to a commercial audience. "Nike's letters to university presidents and directors of athletic departments," the court stated, "were addressed directly to actual and potential purchasers of Nike's products." *Ibid.* In addition the court observed that respondent's complaint alleged that "Nike's press releases and letters to newspaper editors, although addressed to the public generally, were also intended to reach and influence actual and potential purchasers of Nike's products." *Ibid.* Third, the court determined that "[i]n describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about its own business operations." *Id.* at 22a.

The court ultimately concluded that "[s]peech is commercial in its content if it is likely to influence consumers in their commercial decisions" and that "[f]or a significant segment of the buying public, labor practices do matter in making consumer choices." Pet. App. 28a. The court emphasized that its decision "in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices." *Id.* at 2a. "It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." *Ibid.*[3]

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[3] The court saw no need "to articulate a separate test for commercial speech under the state Constitution." Pet. App. 29a. Instead, "[h]aving

Justice Chin, joined by Justice Baxter, dissented. The dissenting justices criticized the majority for "[h]andicapping one side" in an "important worldwide debate" regarding globalization of manufacturers. Pet. App. 31a. They emphasized that "Nike's statements regarding its labor practices in China, Thailand, and Indonesia provided vital information on the very public controversy concerning using low-cost foreign labor to manufacture goods sold in America." *Id.* at 34a. "At the very least," they stated, "this case typifies the circumstance where commercial speech and noncommercial speech are 'inextricably intertwined.'" *Id.* at 37a. Justice Brown also dissented. She agreed with her dissenting colleagues that "the commercial elements of Nike's press releases, letters, and other documents were inextricably intertwined with their noncommercial elements." *Id.* at 59a. In addition, Justice Brown criticized the "rigid dichotomy" between commercial and noncommercial speech, which in her view "fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries." *Id.* at 43a. Justice Brown concluded that the courts need to "adapt the commercial speech doctrine to the realities of today's commercial world," *id.* at 64a, by "develop[ing] a more nuanced approach that maximizes the ability of businesses to participate in the public debate while minimizing consumer fraud." *Id.* at 44a.

SUMMARY OF ARGUMENT

The California Supreme Court mistakenly ruled that respondent's private action should proceed because the suit, according to that court, challenges "commercial speech" that is not subject to the First Amendment's protections. The

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concluded that the speech at issue is commercial speech under the federal Constitution," the court "reach[ed] the same conclusion under the California Constitution." *Ibid.*

California Supreme Court overlooked a more fundamental difficulty with respondent's suit. Respondent seeks judicial relief for allegedly false statements that have concededly caused respondent no harm whatsoever. The First Amendment does not countenance that novel form of private action in light of its severe threat to freedom of speech.

I. The First Amendment permits reasonable regulation of speech that is false, deceptive, or misleading, through the mechanisms of private causes of action and direct government regulation. A traditional common-law private suit for misrepresentation presents no First Amendment difficulties because it contains features that obviate potential constitutional concerns. A private plaintiff who seeks relief for misrepresentation must show that he reasonably relied on the false statement and consequently suffered actual injury. Those requirements limit the prospect of liability to cases that implicate the government's interests in preventing fraud and compensating injured individuals, and thereby ensure that the lawsuit does not chill protected expression. Similarly, the government's traditional means of regulating false advertising present no First Amendment difficulties. The government's enforcement powers are constrained by statutory and institutional limitations that avoid intrusions on protected speech.

II. Respondent's unconventional lawsuit, by contrast, rests on a private cause of action, sanctioned by California's unfair competition laws, that lacks traditional safeguards. Respondent claims the right under California's laws to obtain judicial relief for a company's allegedly false statements respecting its products, even though respondent did not rely on those statements or suffer any injury whatsoever. The First Amendment does not tolerate this novel species of private action, which poses a serious threat of unjustifiable chill to legitimate speech on matters of public interest. Because this private enforcement mechanism is

incompatible with the First Amendment, respondent's suit should be dismissed without regard to whether the allegedly false statements at issue constitute "commercial" or "non-commercial" speech.

ARGUMENT

THE FIRST AMENDMENT PROHIBITS STATES FROM EMPOWERING PRIVATE PERSONS WHO HAVE SUFFERED NO HARM TO SEEK JUDICIAL RELIEF FOR ALLEGEDLY FALSE STATEMENTS

Nike and respondent have joined issue throughout these proceedings on whether the statements in question here constitute part of a public dialogue on matters of public interest, and are therefore entitled to the First Amendment's protections, or whether those statements instead constitute "commercial speech" that is subject to laws that regulate false or misleading advertising. That characterization of the issue, however, obscures the key feature of this case that should control its disposition. The First Amendment, which is applied to the States through the Fourteenth Amendment, allows government regulation of speech that is false, deceptive, or misleading. It does not, however, allow States to create legal regimes in which a private party who has suffered no actual injury may seek redress on behalf of the public for a company's allegedly false and misleading statements.

Regardless of whether Nike's statements are "commercial" or "non-commercial" speech, they are not actionable in a private suit unless the plaintiff alleges not only that the statements were false, but that he himself relied on them and, as a result, suffered injury in fact warranting judicial relief. In the context of private causes of action, those requirements ensure that any restriction on speech is justified by the government's interest in preventing actual fraud and compensating injured individuals. Those same require-

ments give substantial protection for speech, even by a corporation, that does not injure individuals or materially affect their purchasing decisions. California's contrary regime unduly burdens and deters speech—whether commercial or non-commercial—and is inconsistent with First Amendment values.

I. THE FIRST AMENDMENT PERMITS REASONABLE GOVERNMENTAL REGULATION OF SPEECH THAT IS FALSE, DECEPTIVE, OR MISLEADING

For two centuries, the First Amendment has comfortably co-existed with the private common-law causes of action and legislation that protect purchasers of goods and services from deception, including fraud, intentional misstatements, and negligent or innocent misrepresentation. Courts and legislatures have developed legal principles to ensure the integrity of representations made in the marketplace. Those principles encourage commerce by allowing marketplace participants to rely on representations that may affect their decisions whether to buy or sell goods and services. Those traditional government limitations on false statements are unquestionably compatible with the First Amendment.

A. The Traditional Private Causes Of Action For Fraud And Deception Include Self-Limiting Features That Ensure Consistency With The First Amendment

The courts have long recognized that false statements in the marketplace are actionable, irrespective of the public's right of free speech, if the statements induce reliance and result in actual injury. The traditional principles that govern judicial actions for commercial misrepresentations have always required a substantial link between the challenged statements and the resulting injury. That required link eliminates the prospect that a private action for misrep-

resentation respecting a commercial product or transaction might chill protected speech.

For example, the common law has long permitted fraud actions against individuals who make knowingly false representations for the purpose, and with the effect, of inducing others to act in justifiable reliance thereon. See Restatement (Second) of Torts § 525 (1977); *e.g.*, *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383 (1888). To bring such an action, however, a private plaintiff must show more than that the seller made a false statement, or even a knowingly false statement. The plaintiff also must show that he actually relied on the misrepresentation in deciding whether or not to enter into the transaction, that the misrepresentation was material, and that he suffered damage as a result. See D. Pridgen, *Consumer Protection and the Law* § 2.2, at 2-5 (2002).

This Court's decision in *Smith* v. *Richards*, 38 U.S. (13 Pet.) 26 (1839), illustrates the important role of materiality and reasonable reliance. In that case, the Court ruled that the defendant was liable for misstatements respecting the character of a gold mine that the purchaser bought in reliance on the seller's representations. The Court affirmed the rescission of the resulting agreement, stating:

> We think we may safely lay down this principle, that wherever a sale is made of property, not present, but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation, in effect, amounts to a warranty; at least, that the seller is bound to make good the representation.

Id. at 42. The Court considered the seller's intent to be irrelevant, stating, if "he takes upon himself to make a representation to another, upon the faith of which the other

acts, no doubt he is bound; though his mistake was perfectly innocent." *Id.* at 35-36.

A common-law action for fraud generally requires a showing of intent to deceive or a knowing or reckless falsehood. See Restatement (Second) Torts § 525; *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 502 & n.19 (1984) (noting the "kinship" between the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and the "motivation that must be proved to support a common-law action for deceit"). Nonetheless, consistent with *Smith*, the common law courts often allow private remedies for even innocent misrepresentation, so long as the misstatements have induced reasonable reliance and result in actual harm. Invoking principles of unjust enrichment, state courts have reasoned that it would be "inequitable to allow a person who made a misrepresentation (however innocently) to retain the benefit of the bargain induced by her own misrepresentation." D. Pridgen, *supra*, § 2.25, at 2-62; *id.* § 2.25, at 2-63 ("the trend seems to be to place the loss on the innocent defendant who has misrepresented rather than the innocent plaintiff who has been misled.").[4]

The common law courts have nevertheless cabined the scope of such actions by limiting recovery to those suffering actual injury and by restricting the available forms of relief. The plaintiff must seek relief for the injuries he himself suffered on account of his reasonable reliance on the

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[4] Courts and commentators have reached similar conclusions based on theories that misrepresentations may render contracts voidable or result in a breach of warranty. See Restatement (Second) of Contracts §§ 159, 164 (1981) (innocent misrepresentation may render contract voidable if "assent is induced" by it, the misrepresentation is "material," and reliance is justifiable); Uniform Commercial Code § 2-313, Official Cmt. (seller's affirmation to the buyer concerning the goods that forms part of the bargain "creates an express warranty"); W. Keeton, *Prosser & Keeton on Torts* § 107, at 748 (Lawyer's ed. 5th ed. 1984).

materially false statements. See D. Pridgen, *supra*, § 2.26, at 2-64; *Prosser & Keeton on Torts* § 108; Restatement (Second) of Contracts § 164, at 446 (cmts. b and c). The corresponding relief is typically limited to rescission, or a measure of damages "only to the extent necessary to compensate the plaintiff for the fact that he was induced to part with something more valuable than that which he has received," a measure of damages "substantially the same as rescission." *Prosser & Keeton on Torts* § 107, at 748.

The self-limiting principles of common-law actions for fraud, misrepresentation, and deceit ensure that such actions generally raise no serious First Amendment concerns. The traditional common-law actions for misrepresentation all require, as an initial matter, that the challenged statement be *false or misleading*. As the Court has explained in connection with defamation suits, "there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Id.* at 340 (quoting *Sullivan*, 376 U.S. at 270).

Further, the common law's traditional limits on who may sue ensure that private lawsuits or the threat thereof do not become an inappropriate means of restricting or chilling the free flow of useful information. As this Court has recognized, "erroneous statement[s] of fact" are "inevitable in free debate" respecting public issues, *Gertz*, 418 U.S. at 340, and they occur in the marketplace as well. Consequently, punishing or imposing liability for all untruthful or misleading speech, at the behest of any person who may be motivated to sue, could inhibit a speaker from voicing his view, "even though [he] believe[s] [it] to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Sullivan*, 376 U.S. at 279. Such a regime could cause individuals "to make only

statements which 'steer far wider of the unlawful zone,'" thereby "dampen[ing] the vigor and limit[ing] the variety of public debate." *Ibid.*

The traditional private causes of action for misrepresentation pose scant risk of impinging on First Amendment values because they do not allow private plaintiffs to bring lawsuits based on misrepresentations "in the air," divorced from their actual effects. Cf. *Palsgraf* v. *Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) ("Proof of negligence in the air, so to speak, will not do."). A plaintiff has no cause of action unless he has entered into a transaction (or was deterred from doing so) in reliance on a misrepresentation and was injured as a result. See pp. 9-12, *supra*. Those requirements ensure that lawsuits, and the threat thereof, properly reflect society's strong interests in ensuring the integrity of transactions and compensating those suffering actual injury—not the plaintiff's desire to squelch an expression or viewpoint with which he happens to disagree. The Court made essentially this point in *Gertz* in applying a less demanding standard of scienter for claims seeking compensation for "actual injury," as opposed to presumed or punitive damages. The Court recognized "the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation," but also noted that this "interest extends no further than compensation for actual injury." *Gertz*, 418 U.S. at 348, 349. And because the traditional suit for misprepresentation is directed at what is essentially conduct—the inducement and execution of a purchase or sale—rather than the content of the speech itself, it poses diminished risk of chilling protected expression.

The self-limiting features of the private common-law actions for misrepresentation also obviate abstract and often difficult inquiries into whether a particular statement should receive lesser constitutional protection based on whether it might be characterized as "commercial" or "non-commercial"

speech. The government has a compelling interest in ensuring that consumers are not induced to make purchases based on materially false statements and have an appropriate level of confidence in the representations that are made, regardless of the subject matter of the statements. On the other hand, speech that does not injure individuals or materially affect their purchasing decisions cannot be affected by private actions for misrepresentation. By requiring the private plaintiff to be an actual purchaser who relied on a misrepresentation that was material to the transaction and suffered actual injury as a result, the common-law actions ensure a sufficient nexus between the speech and the integrity of the underlying transactions that the government has an interest in promoting and protecting. There is, accordingly, no need for an abstract inquiry into the "commercial" nature of the speech. The falsity of the statement, its materiality to an identifiable transaction or incident, and the private plaintiff's reasonable reliance leading to actual injury provide a sufficient and constitutionally permissible basis for relief.

B. The Traditional Mechanisms By Which The Government Directly Regulates False Advertising Also Include Self-Limiting Features That Ensure Consistency With The First Amendment

The United States and the individual States have long recognized the need for direct government regulation of advertising to protect the public from false or misleading commercial statements. Sensible regulation promotes market efficiencies, because it frees consumers from the need to conduct individual investigations into the truthfulness of advertising and enables them to make commercial decisions with greater confidence than in a market where the mandate of caveat emptor alone controls. Congress and the States have accordingly enacted legislation to prevent deceptive or

misleading advertising and to remedy, through government enforcement actions, injuries that cannot be effectively cured through private suits. As in the case of traditional common-law actions, the traditional mechanisms of direct government regulation have inherent safeguards that avoid chilling protected speech.

A primary source of federal regulation is the Federal Trade Commission Act (FTC Act). See 15 U.S.C. 41 *et seq.* The FTC Act empowers the Federal Trade Commission (FTC) to issue cease and desist orders against "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. 45(a), including the dissemination of "false advertisements." 15 U.S.C. 52.[5] Similarly, Congress has empowered the Postal Service to proceed against false and fraudulent schemes that use the mails. See 39 U.S.C. 3005; *Donaldson* v. *Read Magazine*, 333 U.S. 178, 191 (1948); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (1904). Finally, the Lanham Trade-mark Act, 15 U.S.C. 1051 *et seq.*, provides for a civil action under federal law against any person who, "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. 1125(a)(1)(B).

The FTC applies a three-pronged test to determine whether advertising is deceptive within the meaning of the FTC Act. The FTC inquires whether: "(1) a claim was made; (2) the claim was likely to mislead a reasonable consumer and (3) the claim was material." *Novartis Corp.* v. *FTC*, 223 F.3d 783 (D.C. Cir. 2000) (citation omitted); see generally Letter from James C. Miller, III, FTC Chairman, to Rep. John Dingell (Oct. 14, 1983) (FTC Policy Statement),

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[5] Numerous States have similar authority under so-called Little FTC Acts. See D. Prigden, *supra*, § 3.5.

available in In re Cliffdale Assocs., Inc., 103 F.T.C 110, 174-184 (1984) (App.). A claim is "material," under the Commission's standards, if it is one that "is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Novartis*, 223 F.3d at 786 (quoting *Cliffdale*, 103 F.T.C. at 165).[6] To be actionable under the postal fraud statute or the Lanham Act, the false or misleading statement must likewise be material to a consumer's decision, see *Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1042 (9th Cir. 1991) (postal statute); *Lynch* v. *Blount*, 330 F. Supp. 689, 693 (S.D.N.Y. 1971), aff'd mem., 404 U.S. 1007 (1972) (postal statute); *Pizza Hut, Inc.* v. *Papa John's Int'l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000) (Lanham Act), cert. denied, 532 U.S. 920 (2001).[7]

The Federal Trade Commission has exclusive authority to initiate proceedings under the FTC Act; there is no private right of action of any kind. See *Carlson* v. *Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973); *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973); see also *Moore* v.

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[6] "The Commission has historically *presumed* materiality for certain categories of claims: (1) all express claims, (2) intentional implied claims and (3) claims that 'significantly involve health, safety, or other areas with which the reasonable consumer would be concerned,' including a claim that 'concerns the purpose, safety, efficacy, or cost of the product or service,' its 'durability, performance, warranties or quality,' or 'a finding by another agency regarding the product.'" *Novartis*, 223 F.3d at 786 (quoting FTC Policy Statement, *Cliffdale*, 103 F.T.C. at 182)).

[7] Neither the FTC Act, see, *e.g.*, *Removatron International Corp.* v. *FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989); *Porter & Dietsch, Inc.* v. *FTC*, 605 F.2d 294, 309 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980), nor the postal statute, see *Lynch* v. *Blount*, 330 F. Supp. 689, 692-694 (S.D.N.Y. 1971), aff'd mem., 404 U.S. 1007 (1972), nor the Lanham Act, see *Johnson & Johnson* v. *Carter-Wallace, Inc.*, 631 F.2d 186, 189 (2d Cir. 1980); *Parkway Baking Co.* v. *Freihofer Baking Co.*, 255 F.2d 641, 648 (3d Cir. 1958), requires, as a precondition to relief, a demonstration that the defendant had an intent to deceive.

New York Cotton Exch., 270 U.S. 593, 603 (1926).[8] The government need not show, of course, that *it* relied on the misleading statements or that the government *itself* was injured. Rather, the government has the unique sovereign responsibility to protect the public. Because the government has a responsibility to *prevent* deceptive and fraudulent practices from causing injury, it may take enforcement action without regard to whether any person has relied on the misrepresentations or has yet been injured thereby. The focus of government enforcement, instead, is typically whether the false claims are material to consumer choice. The government's remedies are consonant with the role of government enforcement. "[I]n proper cases," the FTC "may seek and after proper proof, the court may issue, a permanent injunction," 15 U.S.C. 53(b), which may include monetary equitable relief, such as restitution and disgorgement. See *FTC* v. *Febre*, 128 F.3d 530, 537 (7th Cir. 1997) (disgorgement); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 469-470 (11th Cir. 1996) (disgorgement); *FTC* v. *Pantron I Corp.*, 33 F.3d 1088, 1102-1103 (9th Cir. 1994) (restitution), cert. denied, 514 U.S. 1083 (1995); *FTC* v. *Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir.), cert. denied, 493 U.S. 954 (1989).

Neither this Court, nor any other, has suggested that these traditional forms of government regulation of false advertising produce unacceptable chill or impinge on First Amendment values. See, *e.g.*, *Bristol-Myers Co.* v. *FTC*, 738

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[8] The Lanham Act requires plaintiffs to allege competitive injury and does not permit false advertising suits by consumers. See *Serbin* v. *Ziebart Int'l Corp.*, 11 F.3d 1163 (3d Cir. 1993); *Colligan* v. *Activities Club of N.Y., Ltd.*, 442 F.2d 686, 694 (2d Cir.), cert. denied, 404 U.S. 1004 (1971). Moreover, an award in a Lanham Act false advertising case "based on defendant's profits" appears to "require[] proof that the defendant acted willfully or in bad faith." *ALPO Petfoods, Inc.* v. *Ralston Purina Co.*, 913 F.2d 958, 968 (D.C. Cir. 1990) (Thomas, J.).

F.2d 554, 562 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); *Harry & Bryant Co.* v. *FTC*, 726 F.2d 993, 1001-1002 (4th Cir.), cert. denied, 469 U.S. 820 (1984); *Encyclopaedia Britannica, Inc.* v. *FTC*, 605 F.2d 964, 972 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980); *United States Postal Serv.* v. *Athena Prods.*, 654 F.2d 362, 367 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); *Vidal Sassoon, Inc.* v. *Bristol-Myers Co.*, 661 F.2d 272, 276 n.8 (2d Cir. 1981). Cf. *Konigsberg* v. *State Bar*, 366 U.S. 36, 50-51 (1961) ("general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests").

Moreover, the institutional checks on government enforcement provide ample protection for protected speech. As an initial matter, government enforcement is subject to public interest constraints that tend to avoid First Amendment conflicts. Because the government has exclusive authority to prosecute false advertising, because its prosecutions must meet materiality standards, and because it has limited resources to prosecute consumer fraud, federal officials must exercise their discretion so as to select for prosecution those cases that represent the best use of public resources. Unlike private parties, federal officials are politically accountable for their decisions. They are subject to public and congressional oversight, which creates strong incentives to exercise enforcement discretion wisely. The government's enforcement actions are accordingly limited to those false statements most likely to harm consumers. Cf. *Alden* v. *Maine*, 527 U.S. 706, 759-760 (1999).

In addition, the government has discretion in selecting remedies that balance the public interest against legitimate rights of free expression. The government may, and fre-

quently does, seek to remedy false statements through prospective relief requiring cessation of false advertising or correction of misstatements, without pursuing restitution or disgorgement of profits. See, *e.g.*, *National Comm'n On Egg Nutrition* v. *FTC*, 570 F.2d 157 (7th Cir. 1977) (FTC entered a final order directing petitioners to cease and desist from disseminating advertisements containing statements to the effect that there is no scientific evidence that eating eggs increases the risk of heart and circulatory disease), cert. denied, 439 U.S. 821 (1978). Indeed, for those cases initiated as administrative proceedings, the FTC does not have authority to seek monetary relief unless it brings a separate case in district court and shows that the defendant engaged in dishonest or fraudulent conduct. See 15 U.S.C. 57b(a)(2).[9]

Furthermore, the FTC and the Postal Service have developed a coherent body of decisions on consumer fraud that channel agency decision-making and enable individuals and corporations to determine before they speak what sorts of statements might make them subject to suit. See, *e.g.*, *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. Pt. 260. They also may seek guidance from the FTC on proposed conduct, and any guidance that the government provides becomes part of the public record. See 16 C.F.R. 1.1-1.4. As the District of Columbia Circuit has explained, the federal government's body of decisions help to "provid[e] certainty and specificity to the [broad] proscriptions of the Act" by allowing "for the centralized and orderly development of precedent applying the regulatory statute to a diversity of fact situations." *Holloway* v. *Bristol-Meyers Corp.*, 485 F.2d 986, 998 (1973). In contrast, "[p]rivate litigants are

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[9] The Postal Service's remedial authority extends only to denying fraudulent schemes the use of the mails, refusing to pay postal money orders, and issuing cease and desist orders. 39 U.S.C. 3005(a). The statute does not speak to injunctive or restitutionary relief.

not subject to the same constraints," and "may institute piecemeal lawsuits, reflecting disparate concerns and not a coordinated enforcement program," thereby "burden[ing] not only the defendants selected but also the judicial system." *Id.* at 997-998. This Court similarly recognized the greater risk to First Amendment interests from private defamation suits relative to criminal prosecutions. *Sullivan*, 376 U.S. at 277-278.

II. THE FIRST AMENDMENT BARS RESPONDENT'S PRIVATE LAWSUIT, WHICH RESTS ON A NOVEL LEGAL REGIME THAT CAN CHILL PROTECTED SPEECH

There is no question that the United States or a State may recognize the traditional private causes of action for misrepresentation, or take direct government action to prevent or remedy false advertising, without transgressing the First Amendment. Respondent's lawsuit, however, falls outside those traditional and fully constitutional domains. The lawsuit at issue here is predicated on California's novel consumer protection laws, which lack the constraining features that have traditionally served to prevent any conflicts from arising between the First Amendment and laws that prohibit fraud and regulate false advertising. In particular, California's apparently unique provision that a private party may sue for misrepresentation—even though the party did not reasonably rely on the statement, did not make a purchase, and was not injured in any way—has the capacity to chill protected speech. The state courts cannot, consistent with the First Amendment, provide a forum for such private suits. See *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 668 (1991) (A State's enforcement of legal obligations "through the official power of the [State's] courts * * * is enough to constitute 'state action' for purposes of the Fourteenth Amendment.").

A. California Law Authorizes A Private Cause Of Action That Transgresses the First Amendment

California's unfair competition laws provide an unusual private judicial remedy. Unlike traditional common law causes of action, federal prohibitions, and the consumer protection laws of other States, California permits private lawsuits challenging allegedly false advertising without regard to the traditional limitations that obviate First Amendment concerns, with the resulting possibility of chilling the scope of public debate and the free flow of useful information. See *Riley* v. *National Fed'n for the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988); *Sullivan*, 376 U.S. at 279.

Under California law, "any person" may sue for false advertising in a representative capacity "acting for itself, its members or the general public," see Cal. Bus. & Prof. Code §§ 17204, 17535 para. 2, without establishing any injury or satisfying the regular requirements for certifying a class. See, *e.g.*, *Stop Youth Addiction, Inc.* v. *Lucky Stores, Inc.*, 950 P.2d 1086, 1091 (Cal. 1998). To obtain injunctive relief, a plaintiff need only show that the defendant's practices are "likely to deceive" the public. *Committee On Children's Television, Inc.* v. *General Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983). "*Allegations of actual deception, reasonable reliance, and damage are unnecessary.*" *Id.* at 668 (emphasis added). Those provisions, in the context of private party suits, create severe First Amendment concerns, particularly in connection with the broad remedies that California law affords. They open the door to private lawsuits that seek judicial relief despite the fact that the allegedly false statements caused no actual injury to the plaintiff and potentially no injury to anyone.

As this Court explained in *Gertz*, there is a "strong and legitimate state interest in compensating individuals for injury"—in that case injury to reputation. 418 U.S. at 348.

As noted above, the common law properly recognizes that misrepresentation is actionable if the plaintiff reasonably relies on a false statement that results in tangible harm. But here, as in *Gertz*, the state interest in providing a remedy in private litigation generally "extends no further than compensation for actual injury." *Id.* at 349. See *Sullivan*, 376 U.S. at 277 (expressing concern that Alabama defamation law imposes liability "without the need for any proof of actual pecuniary loss"). The State's interest in protecting transactions and consumers does not justify a legal regime in which a private plaintiff may sue, not to seek personal redress for any harm resulting from the misstatement, but rather because the plaintiff disagrees, as a theoretical matter, with the content or accuracy of the statement. *Gertz* is particularly instructive because the Court adopted a heightened standard of scienter for a plaintiff to obtain presumed or punitive damages without showing actual injury because the authorization of recovery "without evidence of actual loss" was "an oddity of tort law." 418 U.S. at 349. That is precisely the circumstance presented here. California law is anomalous in allowing a private plaintiff to sue without any allegation of injury. In fact, respondent expressly "alleges no harm or damages whatsoever regarding himself individually." Compl. para. 8.[10]

Respondent's suit poses a particular prospect for chilling speech because California law appears to allow private

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[10] To be sure, the Court allowed the recovery of presumed and punitive damages upon a less demanding showing in cases involving speech on a matter of purely private concern in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). But although that result suggests that speech on purely private matters may be subject to even less protection, it provides no support for a statute that dispenses with any requirement that the plaintiff suffer actual injury. The chill that concerned the Court in *Sullivan* and *Gertz* would have been much greater if the defamation actions at issue there were not limited to those allegedly defamed.

parties to obtain substantial monetary awards based on no more than a threshold showing of materiality. So long as the "likely to deceive" threshold is met, the California courts may order restitutionary relief at the behest of a private party without regard to whether that party was deceived or injured. The court need only determine such relief is "necessary to prevent the use or employment of an unfair practice." *Bank of the West* v. *Superior Court*, 833 P.2d 545, 553 (Cal. 1992); *Committee on Children's Television*, 673 P.2d at 668-669; *Fletcher* v. *Security Pac. Nat'l Bank*, 591 P.2d 51, 54 (Cal. 1979).[11]

California's broad license to "private attorneys general," coupled with the absence of any requirement that the plaintiff show actual deception, reliance, or injury, poses a threat to speech respecting commercial activities and conduct. The California regime lacks the institutional checks that have traditionally accompanied government enforcement schemes, including legislative oversight and public accountability, and raises the prospect of vexatious and abusive litigation. Cf. *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 775-776 (2000) (noting the historic abuse of "informer statutes"). The California regime allows private lawsuits that are motivated, not by the need to redress for actual harm, but rather by disagreement with the speaker's policies, practices, or points of view, or by the prospect of financial gain.

California's regime is particularly troubling because the scope of restitutionary relief appears wide-ranging and provides potentially enormous rewards to entrepreneurial plaintiffs. By its terms, the law authorizes the courts, at the

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[11] A representative plaintiff proceeding under the California unfair competition law may not obtain damages or attorney's fees. Pet. App. 6a. See *Cortez* v. *Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 712 (Cal. 2000); *Bank of the West*, 833 P.2d at 552.

behest of a private party, to "make such orders or judgments * * * as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Cal. Bus. & Prof. Code § 17203; accord *id.* § 17535 para. 1 ("The court may make such orders or judgments * * * which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.").

For example, the California Supreme Court has rejected the argument that "in order to obtain any monetary recovery under section 17535," private plaintiffs "must present individual proof that each allegedly defrauded consumer seeking restitution did not know of the fraud." *Fletcher*, 591 P.2d at 56. The court explained that the statute's provision for restitution of money that "may have been acquired" by means of an unfair practice "is unquestionably broad enough to authorize a trial court to order restitution without requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction." *Id.* at 56-57. Thus, an order for restitution under the California unfair competition law "may require the defendant 'to surrender all money obtained through an unfair business practice' including 'all profits earned as a result of an unfair business practice.'" Pet. App. 6a (quoting *Kraus* v. *Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 725 (Cal. 2000)). Respondent seeks to avail himself of this power to its full extent by requesting an order requiring Nike "to disgorge all monies which NIKE acquired by means of any act" that is found to be an unlawful practice under the California unfair competition law. Compl., Prayer for Relief para. 1. The provision of broad authority to seek such remedies without proving an actual injury to specified individuals is by no means inappropriate for governmental

agencies charged with enforcing the law. Such agencies are subject to numerous constraints and can be expected to exercise appropriate discretion in the invocation. See pp. 14-20, *supra*. Indeed, Congress has granted the FTC such authority. But to arm millions of private citizens with such potent relief, and to permit them to demand it without showing of injury to themselves or anyone else, unacceptably chills speech, particularly unpopular speech that is likely to become the target of such lawsuits.[12]

California's grant of such novel, broad, and unconstrained powers to private plaintiffs threatens to dampen protected expression. Companies like Nike that seek to engage in a debate on issues of public concern with a connection to their own operations (if only to respond to their critics) may well think long and hard before subjecting themselves to the risk of a judgment, at the behest of a single resident in California, that divests them of their profits on the basis of a statement that, after the fact, is held to have been "likely to deceive" the public, even if it injured no one. California's private cause of action may thus deter commercial speakers from addressing the very issues of public concern about which they may be most knowledgeable, despite the fact that the speakers believe their statements "to be true" and even though the statements are "in fact true"—"because of doubt whether [they] can be proved in court or fear of the expense of having to do so." *Sullivan*, 376 U.S. at 279. The potential for massive monetary liability for past statements may cause even a company of Nike's size to refrain from presenting its side of the story, or to do so only in vague—and far less

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[12] It is not an answer to those remedial concerns to allow the case to go forward and determine the constitutionality of the remedies at a later juncture. The lack of any requirement of injury or reliance, while compounded by the availability of potentially broad disgorgement remedies, suffices to render the state law incompatible with the First Amendment.

informative—generalities. If this result were to obtain, debate on public issues would be the poorer.

B. There Is No Need In This Case To Decide Whether The Allegedly False Statements At Issue Here Are "Commercial" or "Non-Commerical" Speech

Because the above-described defects in California's private enforcement regime render it inconsistent with the First Amendment, this Court has no occasion to decide whether the speech at issue here is in fact "commercial" within the meaning of its cases. Indeed, the Court ought not address that issue, because it arises here, in a particularly abstract form, only by virtue of the unusual—and we think unconstitutional—private cause of action that is unique to California law.

As noted above, in typical private actions for deception or misrepresentation, there is rarely, if ever, any need to distinguish between commercial and non-commercial speech. If a plaintiff can show that he was deceived by a material misrepresentation, reasonably relied on it, and entered (or refrained from entering) into an actual transaction because of it, the misrepresentation provides a basis for relief that does not implicate First Amendment concerns. Suits of that sort provide ample breathing room for legitimate free expression. There is simply no need for the courts to evaluate the "nature" of the speech divorced from the actual commercial transactions that they are alleged to have affected. The fact that the statement was "material" to the transaction, induced reasonable reliance, and caused injury, renders the statement actionable without inquiry into its "commercial" or "non-commercial" character.

Nor does the issue often arise in government enforcement cases. Agencies like the FTC have established guidelines for enforcement that take context into account and focus their limited resources on the cases that matter most—those most

likely to have an effect on actual transactions. Their enforcement actions thus reflect society's strong interest in ensuring the integrity of actual or proposed transactions, not abstract disagreements with the speaker. When an agency like the FTC brings an enforcement action, the court also has the benefit of the agency's expertise, investigation, and record.

Significantly, the determination whether the speech at issue here is "commercial" or "non-commercial" will likely confuse rather than clarify the standards. In other contexts, this Court has repeatedly recognized the benefits of awaiting suit by an individual suffering actual injury, so that "the scope of the controversy [will be] reduced to more manageable proportions, and its factual components fleshed out, by some concrete action." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990); see *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58-59 (1993) (noting, for similar reasons, that mere passage of a statute and issuance of regulations do not give a complainant a ripe claim absent agency action "applying the regulation to him"). Reaching the commercial speech issue in this abstract context raises serious risks of unintended consequences.

For example, in an effort to create breathing room for speech on matters of public concern, Nike appears broadly to suggest that speech is not commercial unless it addresses the "characteristics of Nike products," Pet. 13—by which Nike presumably means the "purpose, safety, efficacy, or cost of the product or service,' its 'durability, performance, warranties or quality,'" *Novartis*, 223 F.3d at 786 (quoting FTC Policy Statement, *Cliffdale*, 103 F.T.C. at 182)—and cannot encompass representations concerning Nike's means of production made in what the company characterizes as a broader debate on more general matters of public concern, Pet. 14-15.

Whatever the usefulness of that sort of categorization in the context of this case, it has little application—and could cause significant mischief—if applied elsewhere. In today's environment, the means used to produce goods, no less than the quality of the goods themselves, have profound significance for some consumers, who are willing to pay more to achieve desirable environmental or social ends. Thus, the FTC would undoubtedly be empowered to bring an action against, for example, a coffee grower that represented that it employed rain-forest-protective practices or a tuna producer that represented its tuna as "dolphin safe" if, in fact, those representations were false. Such representations are material to many consumers and can induce reliance. Although those representations say nothing about the actual quality of the product and deal with production practices thousands of miles away, they nevertheless influence consumer choice and allow sellers to command premiums from consumers who are willing to pay more to protect rain forests or marine mammals.[13]

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[13] Furthermore, such statements, if false, may be actionable even if they appeared in the context of advertisements addressing a matter of public concern, such as sound forest or ocean management. Consumers derive information on products from a variety of sources, and this Court has correspondingly refused to "grant broad constitutional protection to any advertising that links a product to a current public debate," since "many, if not most, products may be tied to public concerns." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980). See, *e.g.*, *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983); *Standard Oil* v. *FTC*, 577 F.2d 653, 659 (9th Cir. 1978) ("when discussion of a matter of public concern becomes a vehicle for sale of a product, the representations which bear on the characteristics of the product may take on increased importance in the mind of the public, and it is appropriate for the [FTC] to consider this factor in determining whether the advertising is misleading or deceptive") (Kennedy, J.). The forum for such statements is simply not dispositive. For example, if a manufacturer who markets rain-forest-friendly coffee falsely extols the

In this instance, Nike's customers may, or may not, place reliance on the company's statements respecting the working conditions in its production facilities. That inquiry would be crucial if Nike's statements were the subject of a traditional private action for misrepresentation or a government enforcement action. But those statements are instead the subject of a peculiar species of suit that avoids that inquiry and, in the process, runs afoul of the First Amendment. Because it is precisely the unconstitutional aspects of respondent's suit that prompt the difficult questions concerning "commercial speech," the Court would be wise to leave those questions for another day. Rather, the Court should rule that the First Amendment bars private suits, such as respondent's, that challenge the truthfulness of representations that caused the plaintiff himself no harm.

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virtues of its environmental practices in an Earth Day op-ed, there is no reason those statements should be off-limits to a fraud action that otherwise meets the requirements of the common law. Just as the fact that the statements at issue in *Sullivan* came in a paid advertisement did not take them outside the protection of the First Amendment, the mere fact that material and fraudulent statements appear in an editorial forum should not take those statements wholly outside the law of fraud.

CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted.

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