NO. 02-575

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

NIKE, INC., *ET AL.*,

Petitioners,

V.

MARC KASKY,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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

KENNETH W. STARR
Counsel of Record
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

November 15, 2002

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") respectfully requests leave to file the attached brief *amicus curiae* pursuant to the Court's Rule 37.2. Petitioners have consented to the filing of this brief in a letter filed with the Clerk. Respondent has withheld consent.

The Chamber 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 business 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.

The Chamber and its members have a strong interest in this case because the California Supreme Court significantly curtailed freedom of expression by holding that *most* speech by businesses is "commercial speech" subject to reduced First Amendment protection. This holding is so extreme that even speech on public policy matters such as labor, environmental, and economic issues involving a company's operations can be denigrated as "commercial speech." A substantial amount of speech is at jeopardy.

Just as petitioner Nike, Inc. discussed its overseas labor operations in the statements at issue, other businesses frequently discuss various aspects of their operations in the course of ongoing public policy debates. For example, automobile manufacturers, such as the Ford Motor Company, articulate their positions on 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/ our Company/

environmental Initiatives/ environmental Actions/ bill Ford (Oct. 5, 2000). Health care providers and drug manufacturers, such as Merck, state their positions on the causes of their rising health care and drug prices, and the form of regulation or deregulation that will best help to control those prices, *see, e.g.*, *Remarks by Raymond V. Gilmartin, Chief Executives Club of Boston, at* www.merck.com/newsroom/executivespeeches/011900.html (Jan. 19, 2000). Energy companies, such as ChevronTexaco and Duke Energy, state their positions 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.chevron texaco.com/ environment (last visited Nov. 11, 2002); Statement on Global Climate Change, *at* www.dukeenergy. com/ decorp/ content/ environment/deip12.asp?RBU=1 (last visited Nov. 11, 2002). 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). And manufacturers, such as General Electric, state their positions on 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 Nov. 11, 2002).

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 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 our system of free expression. Speech on public policy

matters has always been understood to lie at the *heart* of the First Amendment, and incorrect statements regarding such matters have always been protected because mistakes are inevitable in such debates. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). All other speakers on these subjects receive full First Amendment protection for those very reasons.

Nonetheless, the California Supreme Court is now suppressing corporations' speech and discriminating against them by holding that speech by businesses (but not their opponents) on important public policy matters is subject to the reduced protection accorded "commercial speech." 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 speech across the globe. In light of the Chamber's strong interest in defending its members against this assault on their freedom of speech, the Chamber seeks leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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

KENNETH W. STARR
Counsel of Record
DARYL L. JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*

The interest of the *amicus* is described in the foregoing Motion for Leave to File.[1]

SUMMARY OF ARGUMENT

For years, the Court has sent conflicting signals on the definition of "commercial speech." The resulting jurisprudential uncertainty has led the lower courts to take widely diverging approaches to determining whether corporate speech is also "commercial speech" subject to reduced protection under the First Amendment. In this case, the California Supreme Court deepened that conflict by creating yet another test for determining whether speech is "commercial." This test is both breathtakingly broad and deeply menacing to our system of free expression. According to California's highest 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 include almost all Americans in the case of a company like Nike); (iii) on commercial matters (which include nearly all matters on which corporations have any reason to speak).

Whatever the correct test may be, this surely is not it. From its inception, the "commercial speech" doctrine has been designed to *broaden* the First Amendment's reach by granting limited protection to product advertisements previously held unprotected. But now, the California Supreme Court has employed the "commercial speech" doctrine to *restrict* the First Amendment's protections by subjecting speech at the core of the First Amendment –

---

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

including speech on important public 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 the Court explained long ago in *Thornhill v. Alabama*, speech "concerning the conditions in industry . . . [is] indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." 310 U.S. 88, 103 (1940). This case presents an excellent vehicle for clarifying one essential limit on the definition of "commercial speech": at a barebones minimum, such speech must address the attributes of a company's products or services, as opposed to its business operations generally. Otherwise, speech that lies at the core of the First Amendment would be relegated to its periphery.

The second reason the Court should grant *certiorari* is to confirm that even if expression is "commercial speech," that label, without more, is not dispositive of the applicable level of constitutional protection. The Court has sent conflicting signals on that question in the past, and this case presents an excellent vehicle for the Court to address the ever-increasing uncertainty by holding that the "commercial speech" label is not a license for discrimination among speakers on important public policy matters such as those at issue here.

The Court's guidance on these important questions is very much needed by the entire business community. As matters stand, the lower courts' uncertainty regarding the definition and treatment of commercial speech is deterring speech on important public policy matters that should be encouraged, not discouraged. Moreover, the increasingly nationwide and even international scope of corporate speech means that many corporate speakers are effectively bound by the law of the least-protective jurisdiction, which is now California. As a result, California's draconian regime is deterring speech around the globe. Indeed, at least one other similar lawsuit has already been filed in California against

eighteen national and international clothing suppliers and retailers. The Court's guidance is needed now.

ARGUMENT

I. THE COURT'S GUIDANCE IS NEEDED ON THE DEFINITION OF COMMERCIAL SPEECH.

This case presents an important and timely opportunity to address the confusion and division generated by the Court's past pronouncements on the definition of "commercial speech."

A. The Court's Precedents Have Generated Substantial Uncertainty Regarding the Definition of "Commercial Speech."

The Court has announced at least three different tests for determining whether speech is "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) (emphasis added). At times, however, the Court has announced a more expansive test: that "expression related solely to the economic interests of the speaker and its audience" is commercial. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). The Court employed yet a third test in *Bolger v. Youngs Drug Prods. Corp.* by considering 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. 463 U.S. 60, 66-68 (1983). The *Bolger* Court added to the indeterminacy of the Court's precedents by indicating that speech is not necessarily commercial even if all three factors are met, and conversely that speech can be commercial even if all three factors are not met. *See id.* at 66-67 & n.14.

The Court has acknowledged the inconsistency and indeterminacy of these and other precedents:

> [W]e have stated that speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression. We have also suggested that such lesser protection was appropriate for a somewhat larger category of commercial speech – "that is, expression related solely to the economic interests of the speaker and its audience." We did not, however, use that definition in either *Bolger* or in [*Board of Trustees v. Fox*, 492 U.S. 469 (1989)] .... In *Fox*, we described the category even more narrowly, by characterizing the proposal of a commercial transaction as "*the test* for identifying commercial speech."

City of Cincinnati v. Discovery Network, 507 U.S. 410, 422-23 (1993) (emphasis in original; citations omitted). The Court chose not to resolve this inconsistency, however, because the parties agreed that the speech at issue in that case was commercial. *See id.* at 416.

Lower courts and commentators have expressed frustration with the long-running uncertainty. The Second Circuit, for example, has lamented the "doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved." *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998). Commentators agree that the 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* Laurence H. Tribe, *American Constitutional Law* 896 (2d ed. 1988); Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 5 (2000) (noting

that the "boundaries" of commercial speech are "quite blurred").

B. The Lower Courts Are in Conflict on the Definition of "Commercial Speech."

The indeterminacy of the Court's precedents has inevitably led to a conflict among the Courts of Appeals and the California Supreme Court. The Seventh Circuit has concluded that while "[i]t is not for us to proclaim the official demise of the *Central Hudson* test," "we will not rush to endow that standard with a greater scope than the traditional definition" of "speech which does *no more than propose a commercial transaction*." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684-85 (7th Cir. 1998) (emphasis added). In doing so, the Seventh Circuit, speaking through now-Chief Judge Flaum, stressed "the incredible breadth of the *Central Hudson* test if taken to its literal extremes." *Id.* at 684.

The Ninth Circuit has imposed an especially stringent variant of the *Virginia Pharmacy* test. (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun.*, 425 U.S. at 762 (1976)(*"Virginia Pharmacy"*)). After determining that the Court's *Discovery Network* decision "cast serious doubt upon [*Bolger*]," the Ninth Circuit limited commercial speech to traditional advertising. *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999). As the court explained, "[t]his simply is not a case of 'I will sell you X at the Y price.' Under *Discovery Network*, that observation alone suffices to classify the expression as non-commercial." *Id.* (quoting *Virginia Pharmacy*). Although the Ninth Circuit later granted *en banc* review in *Thomas*, the eleven-member *en banc* court dismissed the case on ripeness grounds without reaching or commenting on the commercial speech issue. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (*en banc*). Thus, Judge O'Scannlain's panel opinion on that issue remains

"persuasive authority" in the Ninth Circuit. *See Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999).

Perhaps for that reason, at least two subsequent panels of the Ninth Circuit have held speech to be noncommercial under similarly restrictive tests. In *Hoffman v. Capital Cities/ABC, Inc.*, the Ninth Circuit held that speech was not commercial because it did not appear "*in a traditional advertisement printed merely for the purpose of selling a particular product.*" 255 F.3d 1180, 1185 (9th Cir. 2001) (emphasis added). The court further explained that "[t]here are commonsense differences between speech that does no more than propose a commercial transaction and other varieties, and common sense tells us that this is not a simple advertisement." *Id.* at 1185-86 (internal quotation and citation to *Virginia Pharmacy* omitted). *See also Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) ("If speech is not 'purely commercial' – that is, if it does more than propose a commercial transaction – then it is entitled to full First Amendment protection.").

The Tenth Circuit has agreed with this analysis by holding that "commercial speech is best understood as speech that *merely advertises a product or service* for business purposes." *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) (emphasis added). Because the speech at issue in *Cardtoons* did not "merely advertise[] a product or service," the Tenth Circuit held that it was not "commercial speech." *Id.*

In contrast to the circuits that have followed variants of the *Virginia Pharmacy* test, other circuits have followed an expansive version of the *Bolger* test. *See, e.g., Procter & Gamble Co. v. Amway*, 242 F.3d 539 (5th Cir. 2001); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999). In *Procter & Gamble*, one company made statements about a competitor's business operations – specifically, about

whether the competitor donated its profits to the Church of Satan – and suggested that consumers boycott the competitor's products for that reason. Under *Bolger*, the Fifth Circuit concluded that this was "commercial speech" if the speaker "acted *substantially* out of economic motivation." *Procter & Gamble Co.*, 242 F.3d at 552-53 (emphasis in original). The court of appeals reasoned that the second *Bolger* factor was satisfied by references to the competitor's products, and "[t]he first factor – whether the speech is an advertisement – seems to collapse into the third factor," which is the speaker's motivation. *Id.* The Fifth Circuit thereby held that even boycott-related speech, as opposed to traditional product advertising, can be considered commercial speech.

Here, the California Supreme Court did not follow any of the variants of the *Virginia Pharmacy* test applied in the Seventh, Ninth, or Tenth Circuits, or even the expansive *Bolger* test fashioned by the Fifth Circuit. Instead, it added to the decisional-law confusion by crafting yet another multi-part test. *See* Pet. App. 17a-20a. Remarkably, the California Supreme Court suggested that its newly-minted test applies for only some purposes; some other (unspecified) test might apply in other cases. *See id.* at 17a. Thus, the court below not only added another "commercial speech" test to the jurisprudential mix, it even threatened further proliferation within its own jurisdiction.

The resulting instability is especially manifest in this case. Nike's speech is not "commercial" under the tests applied in other jurisdictions. Nike did far "more than propose a commercial transaction." *Commodity Trend Serv.*, 149 F.3d at 684-85. Indeed, Nike said nothing resembling "'I will sell you X at the Y price.'" *Thomas*, 165 F.3d at 710. Nor did Nike otherwise engage "in a traditional advertisement." *Hoffman*, 225 F.3d at 1185. It certainly did not "*merely* advertis[e] a product or service." *Cardtoons*, 95 F.3d at 970 (emphasis added). Instead, Nike spoke generally

about its business operations overseas, in the context of an ongoing public policy debate, without mentioning any products or services, or offering any prices or terms of sale. *See* Pet. App. 3a-4a.

By holding such speech "commercial," the California Supreme Court ruled in conflict with the much narrower interpretations of the circuits that follow variants of the *Virginia Pharmacy* test. Its decision reaches even farther than the Fifth Circuit's application of the *Bolger* test, inasmuch as Nike did not refer to any specific products or services for sale.

C. The Court Should Reduce the Confusion and Conflict Among the Appellate Courts By Holding that, At a Minimum, Only Speech Regarding the Attributes of Goods or Services for Sale Can Be Considered "Commercial."

This case presents an important vehicle for addressing the lower courts' confusion concerning the meaning of "commercial speech." While line-drawing in this area may be difficult in some respects, this case turns on an obvious line: only speech advertising the attributes of products or services for sale can be considered "commercial." In contrast, speech that addresses business operations in general, or other matters of public policy, should be accorded full First Amendment protections.

1. The History of the "Commercial Speech" Doctrine Demonstrates that It Addresses Only the Advertising of Products and Services, Not Corporate Speech Generally.

This line is strongly supported by the history of the "commercial speech" doctrine, which shows that the doctrine was intended to *grant* limited protection to product advertising, not to *limit* the protections already applied to other types of corporate speech. The 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). Specifically, the Court gave birth to the doctrine by overruling *Valentine* and holding that "commercial speech, like other varieties, is protected." *Virginia Pharmacy,* 425 U.S. at 760-61.

In doing so, the Court could not have been clearer that by "commercial speech," it was referring only to the narrow kind of product advertisement addressed 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). From its genesis, 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 to give limited *protection* to speech that does "*no more* than propose a commercial transaction." *Id.* .at 761, 762 (internal quotation omitted).

Significantly, the type of expression at issue here – speech on public policy matters involving corporations – was held to be fully protected long before the Court extended

limited First Amendment protection to "commercial" speech. As early as 1940, the Court held that self-interested speech "concerning the conditions in industry and the causes of labor disputes" is not only protected by the First Amendment, it 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); *see also Thomas v. Collins*, 323 U.S. 516 (1945). Thus, speech about business operations generally – as opposed to product advertising – has always received full First Amendment protection, not the limited protection subsequently devised for "commercial speech."

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 business operations generally – is the *sine qua non* of "commercial speech." The Court explained in the early years of the "commercial speech" doctrine that such speech "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), because it "relates to a particular product or service." *Friedman v. Rogers*, 440 U.S. 1, 10 (1979);[2] *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, the 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

---

[2] *Friedman* further emphasized this point by holding that a trade name can be considered to be "commercial speech" only to the extent that it "acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality" of the goods or services provided. 440 U.S. at 12; *see also id.* at 16.

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 L. Tribe, *American Constitutional Law* § 12-15, p. 903 (2d ed. 1988)) (emphasis added; other emphasis omitted).

In keeping with this long-established understanding of the "commercial speech" doctrine, the Court (unlike 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, the Court has held that while a manufacturer's speech about the attributes of a specific product is "commercial" regardless of 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 is not "commercial." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8-9 (1986) (plurality opinion). Such expression "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 and quotations omitted).

2. Nike's Speech Is Fully Protected.

So does Nike's speech. Far from advertising its products' attributes, Nike responded to public criticism on one of the great issues of the day – globalization, which arouses such strong feelings that anti-globalization protests recurringly shut down parts of the Nation's capital. This is speech at the core of the First Amendment, not the type of "commercial speech" excluded altogether from First Amendment protection prior to *Virginia Pharmacy*. *See, e.g., Thornhill*, 310 U.S. at 103.

To be sure, the California Supreme Court suggested that Nike could have avoided the "commercial speech" label by discussing international labor issues generally without

mentioning any facts regarding its operations. *See* Pet. App. 26a. But that is no more plausible than requiring respondent's lawyers to draft a Brief in Opposition without mentioning any facts in the case. Opinions frequently if not invariably flow from facts, and are certainly more persuasive when they rest on articulable facts. The public would in no wise benefit from a legal regime that encouraged Nike to discuss conclusions divorced from facts. Under such an odd regime, the public would by definition receive less information from Nike, and have less basis for assessing Nike's statements. "[P]ublic debate must not only be unfettered; it must also be informed." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 n.18 (1978) (internal quotation omitted).

Indeed, corporations are generally accorded the same free speech rights as other speakers precisely because the First Amendment is designed in part to protect the public's access to information, and "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source." *Bellotti*, 435 U.S. at 777; *see also Pac. Gas & Elec.*, 475 U.S. at 8. Suppressing speech 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." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Accordingly, this should be an easy case. If Nike had included references to specific products or services in its statements, this would at least be a closer case. If Nike had engaged in brand-name advertising that was designed to cause people to believe that its products are generally of high quality or low cost, this would likewise be a closer case. If Nike had included false statements such as "Made in the U.S.A." on the labels of specific products, this would likewise be a closer case. But instead of making any statements connected with the sale of specific goods or

services, or otherwise promoting the attributes of its goods or services, Nike spoke about its treatment of third-world laborers in the context of an ongoing public policy debate. That expression falls well outside the "commercial speech" category.

II. THE COURT'S GUIDANCE IS NEEDED ON THE TREATMENT OF COMMERCIAL SPEECH.

Even if the speech were deemed "commercial," that should scarcely be the end of the matter. In the past, the Court has sent conflicting signals on whether the "commercial speech" label alone dictates the applicable level of First Amendment protection, or whether further analysis is required. The Court should take this opportunity to confirm that the "commercial speech" label does not invariably trump all other strands of First Amendment jurisprudence, especially the fundamental prohibition against discrimination among speakers.

A. The Court Has Sent Conflicting Signals on the Treatment of "Commercial Speech."

The Court has also "followed an uncertain course" in determining what level of protection to accord speech that has been determined to be "commercial." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring in part and in judgment). In some cases, the 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, e.g., Discovery Network*, 507 U.S. at 424 (emphasizing that courts must be careful not to "place too much importance on the distinction between commercial and noncommercial speech"). But in other cases (and especially in older cases) the Court has held the "commercial speech" label dispositive of the level of protection accorded the speech. *See, e.g., Central Hudson*, 447 U.S. at 561-66.

The Court's most recent precedents have 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, J. and Thomas, J.). 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 traditional test sufficed for purposes of that case:

> 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, 510-514] (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., joined by Scalia, J., concurring in part and in judgment) (emphasizing that in view of the "obvious overbreadth" of the restriction at issue, the Court was not required *in that case* "to consider whether *Central Hudson* should be retained in light of the substantial objections that can be made to it").

Most recently, in *Thompson v. Western States Medical Center*, the Court again noted that "several Members of the Court have expressed doubts about the *Central Hudson* analysis." 122 S. Ct. 1497, 1504 (2002). But the Court again declined "to break new ground," in part because "[n]either party . . . challenged the appropriateness of applying the *Central Hudson* framework" in that case. *Id.*

The resulting state of affairs has led to unfortunate results. In *Procter & Gamble,* Judge Smith in writing for the Fifth Circuit held that a corporation's speech about a competitor's religious affiliation could be deemed false "commercial speech" entitled to *no* First Amendment protection. The Fifth Circuit recognized, however, that this speech "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." 242 F.3d at 550. As a result, Judge Smith went out of his way to emphasize that he questioned this result. He discussed at length a law review article suggesting that plaintiffs should at least be required to prove negligence on the part of a corporate speaker that made an incorrect statement. *See id.* at 557-59 (citing Arlen W. Langvardt, *Commercial Falsehood and the First Amendment: A Proposed Framework*, 78 Minn. L. Rev. 309 (1993)). But Judge Smith found that his hands were tied. While he found this proposal "tempting" and even "compelling in a number of respects," Judge Smith felt "compelled to reject it" in light of *Central Hudson* and other precedents of the Court. *See id.* at 557-58.

In this case, the California Supreme Court likewise wrestled mightily with the Court's jurisprudence. In addition to crafting an entirely new definition of "commercial speech," the state supreme court also purported to limit that definition to the application of "state laws barring false and misleading commercial messages." Pet. App. 1a-2a. That limitation makes no sense, because "commercial speech" is "commercial speech," period. It is bizarre to say that the

very same speech is "commercial" if misleading but "noncommercial" if nonmisleading. Whether "commercial speech" is false and misleading goes to the relevant level of protection, not to whether it is "commercial" in the first place. Nonetheless, the court's attempt to limit its holding in this manner reflects a recognition that the applicable level of protection should not always turn only on whether speech falls within that court's test for "commercial speech," but should instead reflect other considerations as well. With that suggestion we have no disagreement. *See also* Pet. App. 41a (Brown, J., dissenting).

B. The Court Should Avail Itself of this Opportunity to Hold that the "Commercial Speech" Label Is Not Alone Dispositive of the Applicable Level of First Amendment Protection.

This case provides an important opportunity to address the treatment of commercial speech. While no comprehensive reassessment of *Central Hudson* is required to decide this case, the Court would foster the fundamental values behind "the freedom of speech" if it were to confirm that all speakers on a public policy matter are to be treated equally under the law, regardless of whether a speaker is engaged in "commercial" speech. This is familiar doctrine. A neutrality principle has long been embedded in First Amendment jurisprudence. Thus, it is now a commonplace that the government may not discriminate among speakers by "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

Yet that is precisely what the California Supreme Court did here. It accorded Nike less protection than that enjoyed by its critics. Thus, the Court should avail itself of this opportunity to hold that even if a corporation's expression on a public policy matter is deemed "commercial speech," it still cannot be punished without the same showing of fault

(be it negligence, actual malice, or willfulness) that would be required in an action brought against any other participant in the debate (such as a defamation suit brought by the corporation).

A contrary conclusion would leave First Amendment freedoms hanging by too slender a thread. In this case, Nike's speech was plainly not "commercial" because it did not address in any way the attributes of goods or services for sale. But typically, the determination whether speech is "commercial" turns on "a matter of degree." *Discovery Network*, 507 U.S. at 423. Indeed, Justice Thomas has "doubt[ed] whether it is even possible to draw a coherent distinction between commercial and noncommercial speech." *Lorillard*, 533 U.S. at 575 (Thomas, J., concurring in part and in judgment).

Under the California Supreme Court's holding, however, a distinction that is often a minor difference in degree is transformed into a major difference in kind. If Nike's speech is not commercial, then it is entitled to full First Amendment protection. But if it is commercial, it is entitled to *no* protection if it is later determined to be incorrect, and only limited protection if it is correct. *See* Pet. App. 10a. Especially given the tenuousness of the commercial/noncommercial speech distinction, this sharp disparity in treatment makes little sense. As one court has pointedly noted, "using the mere identification of commercial speech as the analytic tool [would] operate with a meat cleaver instead of a scalpel, and would amputate much of the core of protected speech from the body of the First Amendment." *Nat'l Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. 627, 646 (D. Md. 1992).

Of course, the simplest way to resolve this case would be to hold that Nike's speech was not "commercial." But if the Court concludes that the speech was commercial, then it should also hold that the speech's status as "commercial"

speech is not dispositive. Instead, the bedrock principle of neutrality dictates that however Nike's speech is labeled, it must be treated the same as all others' speech on the same public policy debate.

III. THE COURT'S REVIEW IS NEEDED TO PREVENT IMMEDIATE AND NATIONWIDE SUPPRESSION OF SPEECH ON IMPORTANT PUBLIC POLICY MATTERS.

The Court's review is needed to prevent immediate harm. The confusion spawned by the Court's "commercial speech" precedents has made it exceedingly difficult for corporate counsel to determine which statements are fully protected by the First Amendment and which are not. Such uncertainty 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 decision below has greatly heightened the need for intervention. The increasingly nationwide nature of corporate speech means that the law of the least-protective jurisdiction effectively governs the national and even international statements of thousands of corporations. If California punishes speech, then nationwide speakers are precluded, as a practical matter, from disseminating it at all.

As matters stand, that means that *most* corporate speech may now be treated as "commercial" speech. The California court held that "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 include almost all Americans in the case of a company like Nike); (iii) on commercial matters (which include nearly all matters on which corporations have any reason to speak). *See* Pet. App. 17a-19a.