No. 02-575

IN THE
Supreme Court of the United States

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 *AMICI CURIAE* AND BRIEF *AMICI CURIAE* ON BEHALF OF THE COUNCIL OF PUBLIC RELATIONS FIRMS, THE ARTHUR W. PAGE SOCIETY, THE PUBLIC RELATIONS SOCIETY OF AMERICA, THE PUBLIC AFFAIRS COUNCIL AND THE INSTITUTE FOR PUBLIC RELATIONS IN SUPPORT OF GRANTING A WRIT OF CERTIORARI

THOMAS H. CLARKE, JR.
ROPERS, MAJESKI, KOHN & BENTLEY
333 Market Street, Suite 3150
San Francisco, CA 94105
(415) 543-4800

BRUCE P. KELLER
Counsel of Record
MICHAEL R. POTENZA
CHRISTOPHER W. DYBWAD
DEBEVOISE & PLIMPTON
919 Third Avenue
New York, NY 10022
(212) 909-6000

Attorneys for Amici Curiae

177349

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Council of Public Relations Firms, the Arthur W. Page Society, the Public Relations Society of America, the Public Affairs Council and the Institute for Public Relations, through their undersigned counsel, hereby respectfully move for leave to file the following brief *amicus curiae* in this case. The petitioners have filed with the Court a letter consenting to filing of all *amicus* briefs in support of either party. Respondents have refused to consent.

Because this brief would materially assist this Court in its consideration of the petition for a writ of certiorari, *amici* respectfully request leave to file the attached brief.

Respectfully submitted,

THOMAS H. CLARKE, JR.
ROPERS, MAJESKI, KOHN & BENTLEY
333 Market Street, Suite 3150
San Francisco, CA 94105
(415) 543-4800

BRUCE P. KELLER
Counsel of Record
MICHAEL R. POTENZA
CHRISTOPHER W. DYBWAD
DEBEVOISE & PLIMPTON
919 Third Avenue
New York, NY 10022
(212) 909-6000

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

INTERESTS OF THE *AMICI CURIAE* [1]

The Council of Public Relations Firms represents the business of public relations and corporate communications. Its 120 member firms include all of the ten largest firms and over three quarters of the top 50 firms (measured by revenue) in the world. Together, *amici* and its members represent every facet of the public relations and corporate communications industry. The mission of the Council of Public Relations Firms is to build the business of public relations and corporate communications by advocating to business professionals the value of public relations as a strategic business tool, promoting the benefits of careers in public relations to prospective employees and assisting members and their clients in setting the standards for the profession.

The Arthur W. Page Society, founded in 1983, is a professional organization with approximately 300 members consisting of chief corporate public relations officers of major companies, as well as other leaders in the public relations profession who are closely related to corporate public relations. Its goals are to strengthen the management policy role of the corporate public relations officer; develop knowledge of corporate management issues; educate the public about the role of public relations management; encourage research that leads to improvement in the corporate public relations function and to introduce these concepts to scholars, teachers and students.

The Public Relations Society of America is the world's largest organization for public relations professionals. Its nearly 20,000 members, organized into 117 chapters, represent business and industry, technology, counseling firms, government, associations, hospitals, schools, professional services firms and nonprofit organizations. Chartered in 1947, its primary objectives are to advance the standards of the public relations profession and to provide members with professional development opportunities through continuing education

1. Counsel for the *Amici* were the sole authors of this brief. No person or entity other than *Amici* made a financial contribution to this brief.

programs, information exchange forums and research projects conducted on the national and local levels.

Formed in 1954 at the urging of President Dwight D. Eisenhower, the Public Affairs Council is one of the leading associations for public affairs professionals. It provides unique information, training and other resources to its members to support their effective participation in government, community and public relations activities at all levels. Nearly 600 member corporations, associations and consulting firms work together to enhance the value and professionalism of the public affairs practice, and to provide thoughtful leadership as corporate citizens.

The Institute for Public Relations, established in 1956 by a senior group of public relations professionals, is devoted to advancing the professional knowledge and practice of public relations through research and education. It has supported more than 200 research projects, ranging from what students of public relations must study in order to understand the profession to how new technologies affect the public relations profession, as well as sponsored numerous competitions and awards to reward excellence in the field.

Amici are in the business of advising and assisting corporations regarding public communications. *Amici* assist companies of all types to gather and disseminate information related to their businesses and communities on all conceivable topics, from investor relations, to philanthropic and community outreach programs, to corporate crisis communications. For decades, *amici* have relied on the First Amendment protections available to all speakers, regardless of their identity, to engage in robust public debate about issues of public concern free from the risk of strike suits. This protection has become even more vital over the last several decades, because, as Arthur Page[2] put it, it has become increasingly true in our information

2. Arthur Page, who was the first chief corporate communications officer to sit on the board of directors of a major U.S. corporation (Cont'd)

age that "all business in a democratic country begins with public permission and exists by public approval." http://www.awpage.com/public/about/apabout/html (last visited Nov. 11, 2002). Because the California Supreme Court's decision will have an unfair, unprecedented and materially chilling impact on the ability of companies and *amici* to speak on issues of public concern, *amici* urge the Court to grant certiorari and decide this matter on the merits.

INTRODUCTION

Amici support Nike's argument that the California Supreme Court's holding that Nike's responses to allegations that it engaged in unfair labor practices abroad amount to commercial speech conflicts with this Court's precedents. *Amici* submit this brief to make the Court aware of the importance of the decision below and the way it has chilled, and will continue to chill, vigorous debate on a wide range of public issues.

SUMMARY OF ARGUMENT

The California Supreme Court incorrectly held that claims asserted under California's unfair competition and false advertising laws on the basis of letters to the editor, press releases and other corporate communications may, consistent with the First Amendment, give rise to strict liability. It based this conclusion on its *sui generis*, three-part definition that "commercial speech" is any "representation[] of fact": (1) made by "commercial" speakers "engaged in commerce"; (2) to an audience that may include potential purchasers or that may report on the issue to potential consumers; (3) about a topic related to "business operations." *Kasky v. Nike, Inc.*, 45 P.3d 243, 247, 256 (Cal. 2002).

This is a test of astonishing breadth that, because it expressly singles out factual representations, amounts to an Orwellian

---

(Cont'd)
(AT&T), is credited with having established the profession of corporate communications.

preference for debate without the benefit of facts. That cannot be squared with the First Amendment because this new test sweeps within its scope ***any*** factual statement, including letters to the editor and opinion editorials; statements published on web sites; media presentations; press releases; television appearances; appearances on the Newshour with Jim Lehrer[3]; C-Span appearances[4]; indeed, ***any*** public statement made by a company about a topic related to what that company does. As a result, the press as a whole—from a newspaper's business section to CNN's Lou Dobbs and CNBC—will suffer a dearth of information because silence will become the prudent course of action for business executives and spokesmen.

This will result in the compelled self-censorship of an enormous amount of protected speech on important matters of

3. *See, e.g.*, *Newshour with Jim Lehrer: Newsmaker: Phillip Knight* (PBS television broadcast, May 13, 1998) (Phillip Knight, CEO of Nike, discussing Nike and globalization); *Newshour with Jim Lehrer: Return of Thalidomide* (PBS television broadcast, August 4, 1998) (John Jackson, CEO of Celgene, on the FDA's decision to give limited approval to Thalidomide, and Celgene's possible marketing of the drug); *Newshour with Jim Lehrer: Bridging the Gap* (PBS television broadcast, March 20, 1996) (Aaron Feurstein, CEO of Malden Mills, discussing corporate responsibility and the wage-profit gap; using examples from Malden Mills); *Newshour with Jim Lehrer: Megamerger Masters* (PBS television broadcast, January 12, 2000) (Steve Case, CEO of America Online, and Gerald Levin, CEO of Time Warner, discussing the impending AOL Time Warner merger and how the consolidation was in the public interest).

4. *See, e.g.*, Leo Mullin, Delta Airlines, Chairman & CEO (C-Span television broadcast, September 25, 2002) (Mr. Mullin discussed the financial well-being of the airline industry and what must be changed in order for airlines to survive); Speech by James Robbins, President and CEO, Cox Communications (C-Span television broadcast, October 22, 2002) (discussing the cable industry); AEI Conference on Productivity & the American Economy—Part 1 (C-Span television broadcast, October 23, 2002) (a panel discussion on the economy including Dick Davidson, Chairman & CEO, Union Pacific Corporation; Marilyn Carlson Nelson, Chairman & CEO, Carlson Company).

public concern because the issues also happen to touch upon the speaker's "business operations":

- Johnson & Johnson's swift public response to Tylenol cyanide tampering in 1982 would, under *Kasky*, expose it to strike suits, *see* pp. 11-13, *infra*;
- McDonald's would no longer respond to its critics, such as Eric Schlosser and his book FAST FOOD NATION, *see* pp. 9-11, *infra*;
- Monsanto and other companies would no longer add their perspective to the debate regarding crop modification, *see* pp. 13-15 *infra*;
- Advanced Cell Technology and other companies would risk suit by entering the public debate on cloning, *see* p. 15, *infra*;
- General Motors and other companies would no longer comment on the pros and cons of airbags for child safety.[5]
- Technology companies would no longer comment on the need for "green card" quota increases to bring specialists into the United States.[6]

---

5. *See, e.g.*, Precious Cargo, available *at* http://gm.com/company/gmability/safety/child_passenger_safety/precious_cargo/index.html (last visited Nov. 11, 2002) ("Another reason to restrain children properly, in a rear seat, is the vehicle's frontal air bags, which are designed to restrain adults. Air bags have to inflate very quickly, faster than a person can blink an eye, and with great force. Serious injury, and even death, can result for anyone—especially a child—who is up against, or close to, a frontal air bag when it inflates.").

6. *See, e.g.*, *Newshour with Jim Lehrer: High-Tech Workers* (PBS television broadcast, Apr. 3, 1998) (T.J. Rodgers, CEO of Cypress Semiconductor, stating "We hire all the Americans we can get" but that green cards still needed for foreign engineers and specialists because there are not enough American engineers to keep pace with the demand for expansion. Rodgers also stated: "I promise that every time I get one of those engineers I will create five more jobs right here in America for Americans to build and sell those products").

- Drug and biotech companies would no longer comment on the effect of the Food and Drug Administration approvals process on the flow of their new products to the market.[7]
- British Petroleum would no longer claim that its solar and wind powered service station was "the world's most environmentally friendly service station" for fear that because it sells gasoline, it would not be deemed sufficiently sensitive to the environment for activist groups.[8]

This list is by no means exhaustive of the potential ill effects of the California Supreme Court's new take on the First Amendment. Because the *Kasky* test covers any utterance where consumers might be present or might be expected to receive the information through media outlets, corporate speech will disappear from every medium of communication with the public.

This new and sweeping test, when coupled with the concededly broad scope of California's unfair competition and false advertising law, will reverberate far beyond California's borders. The *Kasky* test applies to speech made outside of the state whenever the speech is reported—by third parties, the press, or otherwise—in-state. *See Kasky*, 45 P.3d at 256 (liability attaches even when speech directed to "reporters or reviewers" who repeat the message to potential buyers). Other aspects of California's broad unfair competition and false advertising law virtually guarantee that companies doing business in California—and their agents—will face potentially costly strike suits. California law allows any citizen, without even a showing

---

7. *See, e.g.*, *Pharmaceutical Innovation: the enabling conditions*, *at* http://www.merck.com/overview/98ar/p6.htm (last visited Nov. 11, 2002) ("It is critical that the U.S. Food and Drug Administration approve safe and effective new medicines in a timely fashion, so that people who need them will get them as quickly as possible").

8. *See* http://www.bp.com/centres/press/hornchurch media_resources/press_release /index.asp (last visited Nov. 11, 2002) (describing its service station in Hornchurch, England as "the world's most environmentally friendly service station").

of reliance or deception, to bring "private attorney general" actions for restitution and injunctive relief. The challenged statement need not even be false as long as consumers are "misled" by it. CAL. BUS. & PROF. CODE § 17200 *et seq.* and *id.*, § 17500 *et seq.* The remedies available to these "private attorneys general"—making restitution to consumers and a Court-ordered "corrective" speech campaign—further chill protected speech.

All of this strikes *amici* particularly hard. As a *USA Today* editorial reported, "if the Kasky reasoning stands, then the public-relations industry . . . might as well shut down." *Let Nike Speak for Itself*, USA TODAY, Oct. 14, 2002. As troubling as the *Kasky* decision may be for advertisers and advertising agencies, at least there is a well-developed body of law (federal and state) that provides guidance regarding when advertising is false and subject to litigation. No such rules exist for the corporate speech that *amici* help create and disseminate because, prior to the California Supreme Court's decision, that speech correctly was considered to be fully protected, core speech regarding matters of public concern. This makes it difficult, if not altogether impossible, for *amici* and their clients to anticipate where the California courts will draw the line between "misleading" and non-actionable statements.

The *Kasky* decision inevitably will stymie public relations professionals' ability to assist corporations maintain an open dialogue with the public and engage in the "uninhibited, robust and wide-open" public debate that was previously thought to be protected by the First Amendment. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). This Court should issue a writ of certiorari and reverse the California Supreme Court's erroneous decision.

ARGUMENT

I. FACTUAL CORPORATE COMMUNICATIONS ARE A VITAL COMPONENT OF UNFETTERED DEBATE ON MATTERS OF PUBLIC CONCERN

Corporate speech is vitally important to a functioning democracy. As corporations and the communities in which they reside have become more closely linked over the past two decades, the public has come to expect a new level of civic engagement from corporations. *See* EDMUND M. BURKE, CORPORATE COMMUNITY RELATIONS xiv (1999) ("The public environment in which companies operate today . . . is far different than it was just 20 years ago. There are dramatic and far-reaching changes in the expectations of communities and societies today that define and influence how a company can operate"). Public relations professionals facilitate this interaction between the public and companies by providing factual information on topics of interest to both groups. Indeed, the public has made clear that its preference is for more openness and communication from companies, not less. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (instituting several measures designed to increase corporate transparency).

Just as with other participants in public affairs, corporate speech and advocacy plays a significant role in informing public debate and shaping public opinion and policy. As a result, government school curricula recognize the increased role (and expectations) of business in American democracy. *See* Harvard's John F. Kennedy School of Government Course Catalog, KSG BGP-232 "Business as a Political Actor" (describing course designed to analyze the important role that "[b]usinesses play . . . in the public policy processes of capitalist democracies"); *see also* Columbia's School of International and Public Affairs Course Catalog, INAF U9178.001 "Human Rights and Corporate Responsibility" (describing course

designed to analyze the "complex questions arising out of the interaction of business activities and human rights . . . ").

II. PUBLIC RELATIONS CAMPAIGNS THAT MAKE IMPORTANT CONTRIBUTIONS TO PUBLIC DEBATES WILL BE CHILLED BY *KASKY*

For decades, corporate and non-corporate speech on the same topics have appeared together in all of the media traditionally associated with First Amendment purposes: (a) editorials and letters to the editor, (b) paid-for advertised editorials in newspapers, magazines, and other publications, and (c) appearances on news shows and at other public forums. Often, as is the case here, corporations speak in response to speech critical of them. That critical speech, whether by design or because of lack of access or resources fully to research the issue, often leaves out important facts vital to a comprehensive presentation of the issues involved.

For example, in 2001, Eric Schlosser released FAST FOOD NATION, a best-selling social-cultural critique of the fast food industry. The book criticized several aspects of the fast food industry, such as: its contribution to low-wage, unskilled jobs; its role in the dramatic increase in rates of obesity; and, its role in the homogenization of American neighborhoods. *See* Eric Schlosser, FAST FOOD NATION 3-10 (2001). Although the book criticized the industry as a whole, it focused in large part on the practices at McDonald's. Faced with a damning critique of all facets of its business, McDonald's vigorously argued the book provided an incomplete picture. *See, e.g*, Milford Prewitt, *Critics Slam Best-Seller Critique of QSR*, NATION'S RESTAURANT NEWS, Jun. 11, 2001, at 4 ("The real McDonald's bears no resemblance to anything described in that book. The author is wrong about our people, wrong about our jobs and wrong about our food. He also completely ignores our values, which is not surprising since he never contacted us for any information whatsoever"). Other reviewers also questioned the accuracy of the account.

See Regina Schrambling, *Catching America With Its Hands in the Fries*, NEW YORK TIMES, Mar. 21, 2001, at F1 ("Some reviewers have accused Mr. Schlosser . . . of playing fast and loose with the facts").

In order to fill-in the gaps that it felt were missing, McDonald's engaged in the traditional response — counter speech of its own — to present a fuller account of its business. *See, e.g.*, Bonnie Harris, *In Fast Food, Some See Fast Track*, LOS ANGELES TIMES, Mar. 12, 2001, at C1 (describing how many Latinos view McDonald's and other restaurant chains as a key to long-term financial security, and quoting McDonald's spokesman Walt Riker as stating, "We've always disputed the idea that fast-food jobs are dead-end jobs, and our Hispanic workers are evidence of that. We value their work, and we're continuing to encourage their advancement through training and other programs"); *see also* Meredith May, *Teachers Sizzle Over Fast Food Fund-Raiser*, SAN FRANCISCO CHRONICLE, Oct. 15, 2002, at A1 (in response to criticisms that McDonald's encourages obesity, McDonald's spokeswoman pointed out that it was the first major fast food restaurant to introduce salads and reduce the fat content of its products).

Until the California Supreme Court's decision, a corporation like McDonald's right to defend itself and its shareholders from criticism and to present a complete record was grounded on the same unfettered First Amendment protection that the critic enjoyed. In granting critics First Amendment protection in attacking a company while simultaneously denying that same protection to the company in responding to those allegations, the *Kasky* decision impermissibly favors speech from a particular viewpoint. *See R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Indeed, McDonald's response to FAST FOOD NATION dramatically illustrates the unworkability of the *Kasky* test; literally every statement McDonald's made in response—no matter what the issue—concerned its "business operations," because that is

precisely what the book attacked.[9] Under the *Kasky* regime, however, McDonald's would be forced to make the Hobson's choice of either staying silent in the face of this criticism, or risking a potential suit for defending itself publicly.

The *Kasky* decision also creates a false dichotomy between fact and opinion and suggests that corporate statements on issues of public concern can receive First Amendment protection only if they are pure ***opinion***. This false dichotomy between fact and opinion makes the decision even more unworkable. *See, e.g.*, *Board of Trustees v. Fox*, 492 U.S. 469 (1989); *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). This element of the *Kasky* decision strikes at the heart of *amici's* business because companies look to *amici* to maintain open lines of communication with the public. *Amici* assist in researching fully the facts surrounding a given issue and design strategies efficiently to deliver this information to the public. The importance of this free flow of information cannot be overstated.

It is difficult to think of a more stark example of the public benefits that can flow from the free flow of corporate speech than Johnson & Johnson's response to the Tylenol cyanide crisis. In the fall of 1982, seven people who had taken Tylenol died from cyanide contained in the capsules. In the hours following the first news of the crisis, Johnson & Johnson made the crucial decision to communicate everything it knew to the public. As George Frazza, Johnson & Johnson's General Counsel at the time, stated: "[w]e decided we were going to communicate, to be active . . . We were determined to find out what the facts were, and whether we liked them or not, communicate them

---

9. In responding to the concerns raised by FAST FOOD NATION, McDonald's has made numerous factual statements concerning its "business operations." *See, e.g.*, McDonald's Social Responsibility Report, available *at* http://www.mcdonalds.com/corporate/social/report/index.html (last visited Nov. 11, 2002) ("Employees are respected and valued"; "Employees receive work experience that teaches skills and values that last a lifetime"; "Pay is at or above local rate in marketplace").

without gloss to all of our constituencies." *See* Anthony Krulwich, *Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA, and Product Liability Considerations*, 39 BUS. LAW. 757, 767 (1984). As a result, Johnson & Johnson maintained an open dialogue with the press and public throughout the crisis. *See, e.g.*, *5 Die After Taking Tylenol Believed to Contain Cyanide*, NEW YORK TIMES, Sept. 30, 1982 at A12 (Lawrence Foster, a Johnson & Johnson spokesman, describing what information had been learned from authorities and Johnson & Johnson's method of distribution); *see also MacNeil/Lehrer Report: Cyanide Investigation* (PBS television broadcast, Oct. 1, 1982) (Dr. T.N. Gates, medical director of Tylenol, appearing as one of the guests and discussing the manufacturing and distribution of Tylenol in the context of the cyanide crisis).

Johnson & Johnson's forthrightness with the public not only saved the Tylenol brand and perhaps even Johnson & Johnson itself, it contributed to the way American consumer goods are packaged and labeled to be tamper-resistant. *See* Tamar Lewin, *Tylenol Posts an Apparent Recovery*, NEW YORK TIMES, Dec. 25, 1982 at A30 (quoting a market researcher's conclusion that Johnson & Johnson's recovery due to "forthright manner" in dealing with the public during the Tylenol crisis). *Kasky*'s regime of strict liability, however, would inhibit this open communication. Under *Kasky*, if a company makes a broad statement or unintentionally publishes incorrect information concerning its distribution practice (undeniably part of its "business operations"), the proscribed corrective action is so punitive that it may dissuade companies from communicating in the first place.[10] The harsh results of suppressing this openness

10. During the cyanide crisis, Johnson & Johnson made many statements about its "business operations" that would potentially be a basis for liability under *Kasky*. *See, e.g.*, *McNeil/Lehrer Report: Cyanide Investigation* (Dr. Gates' comments that "We are confident . . . that our security, our quality assurance procedures are such that this could not (Cont'd)

are difficult to overstate: Johnson & Johnson's swift public communications literally are credited with saving human life. Of the eight million capsules recalled after Johnson & Johnson began its campaign, seventy-five were found to contain cyanide. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 1149 PLI/Corp 307, 309.

Debates on some of the most important issues of our time have been shaped and influenced by corporate speakers and public relations professionals such as *amici*. To illustrate the importance of corporate speech, and without purporting to be exhaustive, *amici* provide the following additional examples of campaigns that would be chilled, if not squelched altogether, under the *Kasky* regime.

In the last several decades, advances in biochemistry and genetics have created the ability to modify crops genetically. A wide-ranging debate regarding the wisdom of genetic engineering has taken place in the press, in academic circles and in Congress. *See* Michael Specter, *The Pharmageddon Riddle*, THE NEW YORKER, April 10, 2000 (describing the worldwide debate over biotechnology in agriculture). Among other things, critics of the practice argue that genetically modified agriculture, or "Franken-food," will have environmental consequences—such as gene migration and the build-up of resistance to insecticides. *See* Interview by PBS Frontline with Hugh Grant, CEO of Monsanto, (Dec. 2000), *at* http://www.pbs.org/wgbh/harvest/interviews/grant.html (last visited Nov. 11, 2002).

(Cont'd)

have happened in the process of the packaging—manufacture and packaging of the product"; "We do have cyanide in our analytical laboratories because it is required for certain tests . . . But it would not be in any way accessible to the manufacturing process"; "Well, we're shocked, we're dismayed, we've learned that medications can be tampered with at the, we believe at the retail level").

Corporate America has contributed its unique viewpoint to this important debate. The Monsanto Company, a leading provider of agricultural products (such as seeds genetically engineered to be resistant to herbicides) with net sales of $5.46 billion in 2001,[11] has taken perhaps the most public stance on the issue. For example, in an interview on PBS' Frontline, Monsanto's CEO Hugh Grant spoke both about the worldwide benefits of agricultural biotechnology, such as reducing the world's use of harmful pesticides and the ability to provide foods to developing nations, as well as the potential concerns about genetic modification, such as gene migration and pest resistance. *See* Interview by PBS Frontline with Hugh Grant, *at* http:// www.pbs.org/wgbh/harvest /interviews/grant.html.

Monsanto provides to the public a breadth of scientific information that might not otherwise be available. *See, e.g.*, "Monsanto Welcomes U.N. Report on Biotech's Benefits for Developing World" *at* http://www.monsanto.com /monsanto/layout/media/01/07-09-01.asp (last visited Nov. 11, 2002) (sharing "fundamental scientific data" Monsanto and others have developed using genetic modification). Even Monsanto's critics have applauded Montsanto's willingness to engage in this important debate and share its perspective and knowledge on the issue. *See* Gregg Hillyer, *Monsanto Makeover*, PROGRESSIVE FARMER, Feb. 2002 (praising Monsanto's "transparency"); *see also The Pharmageddon Riddle* (describing how Greenpeace invited Monsanto's CEO to its annual gathering to debate an opponent of genetic modification, an invitation that Monsanto's CEO accepted).

The *Kasky* decision, however, creates a strong incentive for Monsanto to disengage from the debate. In debating with its critics, Monsanto's representations about its genetically modified products would no longer be part of a fully protected exchange of information on an issue of public concern, but rather

11. *See* Monsanto Company 2001 Annual Report, available *at* http://www.monsanto.com.

statements about "business operations" that could give rise to liability. *See, e.g.*, Interview with Hugh Grant ("From a food safety point of view . . . these are technologies that have been more widely tested than any other food product that came before them in history . . . they are moving through the scientific regulatory system in Europe with flying colors at the moment").

Issues of great public debate also encompass scientific advances in the field of medicine, and the ethical issues such advances may raise. One such area is the science of cloning and the possible medical uses for the technology associated with it. As such advances came to the public's attention, a vigorous debate ensued concerning the ethical implications of these scientific discoveries. *See* "Therapeutic Cloning Under Fire" *at* http://www.lef.org/magazine/mag2002/mar2002_cover_west_01.html (Mar. 2002) ("when he [Advanced Cell Technology's ("ACT") CEO Dr. Michael West] announced recently that ACT had taken the first step towards human therapeutic cloning, he was suddenly criticized by everyone from President Bush to the Pope").

Once again, corporations that have a financial interest in cloning technologies have joined the public debate to add a unique perspective on the issue. ACT, which initially made the scientific breakthrough making cell cloning possible, has entered the debate on these issues, taking a diametrically opposed view to cloning's critics. *See id.* ("No serious ethicist or embryologist believes that a pre-implantation embryo is a human being. We are not talking about creating a pregnancy. We are talking about making a microscopic ball of cells with no body cells of any kind"). It is precisely these representations about ACT's cloning process, especially in the form of the robust analogies used by Dr. West, that would become fodder for strike suits (as well as suits brought by political advocacy groups opposed to human cloning).

III. AN ENORMOUS AMOUNT OF PROTECTED CORPORATE SPEECH WILL BE CHILLED

The public relations campaigns above demonstrate just a few examples of campaigns that have communicated vital information to the public on matters of importance. As disparate as all of the campaigns and public statements described above may be, they all share characteristics that illustrate why this Court should grant certiorari: (1) all concern issues of great public moment; (2) all involved the dissemination of facts related to the company's "business operations" and (3) the corporations involved all stood to benefit financially as a result of the speech.

If the *Kasky* decision stands, however, all of these campaigns will be subject to strict liability. Monsanto, ACT, and McDonald's are all speakers "engaged in commerce." *Kasky*, 45 P.3d at 311. Statements made during each of these campaigns arguably concerned the "business operations" of each of the companies. Finally, all of the campaigns—although some were taken in part to affect legislation and other regulation—were also in part to "promote . . . sales and profits." *Kasky*, 45 P.3d at 247. In short, because a prudent CEO would no longer be willing to risk speaking about any issue of public importance that also touches upon the "business operations" or profitability of the company the information flow to the public would be severely circumscribed.

IV. THE *KASKY* TEST REPRESENTS A SEA-CHANGE THAT RESTRICTS PREVIOUSLY PROTECTED SPEECH

The broad language of the *Kasky* decision creates an illusory distinction between "policy" discussion, and commercial speech which the California Supreme Court now defines as any statement about "actual conditions and practices" of the business. This distinction is unworkable in practice. The end result is that the test contains no limiting principles because it falsely assumes that because a corporation always is, in part, motivated by profits, that its speech is entitled to no First

Amendment protection. This is at odds with the Court's well-settled precedent. *See, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952) (speech is entitled to full First Amendment protection notwithstanding it is undertaken by "large-scale business conducted for private profit").

The amorphous nature of the test also means that, as a practical matter, there is no guidance for *amici* or others to determine what corporate speech is entitled to First Amendment protection. The risks under the *Kasky* regime are even greater because *amici* often do not control the final presentation of press releases and other communications to the public, the media does. *Cf. Kasky*, 45 P.3d at 256 (statements made to reporters that are passed along to consumers can be commercial speech). Prudent, risk-averse companies will have no option but to decline speaking in order to avoid the possibility of strike suits.

Indeed, for those corporations who enter the public debate, California's broad remedies impose another, even more chilling threat. That law provides as a remedy for speech that, even though true on its face, may mislead some, a "Court-approved public information campaign" to compel a corporation to "correct" editorials and other speech on matters of public importance. *Kasky*, 45 P.3d at 250. In other words, under the California Supreme Court's test, not only would the corporation's speech be subject to a stricter standard of liability than the speech of its critics, but the Company could be compelled to finance a "public-information campaign" entirely against its interest to address potential "confusion" on the public's part.

This is fundamentally at odds with the governing principles of the First Amendment. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (California Public Utilities Commission's order that PG&E permit the "extra space" in its envelopes sent to customers to be used by a public interest group to voice a point of view PG&E did not agree with held to violate PG&E's First Amendment right not to speak). It inevitably will

result in a lopsided debate dominated by corporate critics, bereft of facts that reside exclusively with corporations. The consequences to a fully informed public are difficult to overstate, as Johnson & Johnson's life-saving Tylenol campaign graphically demonstrates.

The Court has taken care to review rulings that disrupt settled practices in the area of commercial speech. *See, e.g.*, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (holding that a New York Public Service Commission regulation and a recently released Policy Statement interpreting the regulation that had the effect of completely banning electrical utilities from advertising violated the First and Fourteenth Amendments); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (holding that a newly-revised provision of the Virginia Code that regulated a licensed pharmacist's ability to publish price information violated the First and Fourteenth Amendments); *In re RMJ*, 455 U.S. 191 (1982) (holding that the newly-revised ethical rules of the Supreme Court of Missouri regulating lawyer advertising violated the First and Fourteenth Amendments). Because the *Kasky* decision threatens to disrupt even a greater amount of speech than the cases above—the decision affects *every corporation* that does business in California—certiorari is appropriate here.

In short, because corporations are entities whose decision makers owe fiduciary duties to shareholders and owners, no responsible corporate spokesman speaks on a company's behalf without being concerned about the effects the statements may have on corporate sales and profits. Because all corporate speech is, and should be, uttered in the interests of benefitting the corporation in the eyes of potential consumers, the speech restricting effects of the California Supreme Court's test will be enormous.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS H. CLARKE, JR.
ROPERS, MAJESKI, KOHN & BENTLEY
333 Market Street, Suite 3150
San Francisco, CA 94105
(415) 543-4800

BRUCE P. KELLER
Counsel of Record
MICHAEL R. POTENZA
CHRISTOPHER W. DYBWAD
DEBEVOISE & PLIMPTON
919 Third Avenue
New York, NY 10022
(212) 909-6000

Attorneys for Amici Curiae