No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari
to the Supreme Court of California

BRIEF OF THE BUSINESS ROUNDTABLE
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS

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February 28, 2003

TABLE OF CONTENTS

TABLE OF CONTENTS – continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITIES

TABLE OF AUTHORITIES – continued

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae The Business Roundtable is an association of approximately 150 chief executive officers of leading corporations with a combined workforce of more than ten million employees in the United States and about $3.7 trillion in revenues. The executives who created The Business Roundtable believed that the U.S. economy would be healthier, there would be less unwarranted intrusion by government into business affairs, and the interest of the public would be better served if there were more cooperation and less antagonism among various sectors of society. They concluded that one way business could be a more constructive force and have a greater impact on government policymaking was to bring the chief executive officers more directly into public debate. The Business Roundtable was founded in the belief that the business sector in a pluralistic society should play an active and effective role in the formation of public policy.

The Business Roundtable's member chief executives actively participate in public policy debates, in California and throughout the nation, and seek to advance policies that foster vigorous economic growth and a dynamic global economy, for the benefit of corporations and consumers alike. The Roundtable has a strong interest in protecting the ability of corporations to participate in robust debate on matters of public concern.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The California Supreme Court incorrectly relegated corporate speech on matters of public policy to a lower level of First Amendment protection than that afforded to other speech on the same issues. Commercial actors have in fact provided unusually valuable contributions to the most important public debates when – and especially when – addressing issues that bear directly on their own economic interests. From the Stamp Act to the debate over the structure and ratification of the Constitution, many of the most prominent contributors to the founding generation's debates were "self-interested" commercial actors who addressed matters directly affecting their commercial interests. That pattern replicated itself over the following generations, and business leaders today provide unique and important contributions to a broad range of public policy issues that directly affect their commercial interests – including issues surrounding technology, international trade, fiscal and energy policy, education, the workforce, health, retirement, the environment, and corporate governance. American public policy debate would be less informed, less balanced, and less robust if commercially "self-interested" speech were accorded second-class status, readily subjected to liability, and inhibited as a result.

The First Amendment protects the right of commercial actors to participate fully in debates on matters of public concern. That protection is determined by the nature of such speech, not by the (corporate) status of the entity or the (economic) motivation of the speaker. The California Supreme Court failed to make the proper determination here because it mechanically concluded that Nike's public defense of its manufacturing and employment practices amounted to no more than selling sneakers. By providing only the limited protections of the "commercial speech" doctrine to *one side* of a debate on important policy issues, the court below significantly diminishes the vitality of that debate.

When a commercial actor makes statements concerning its business operations as a part of a public policy debate, the state's interest in protecting consumers from harm resulting from false or misleading statements is not properly advanced by restrictions on corporate speech like those at issue here. Instead, the vigorous counter-speech of advocacy groups, reporters, and politicians will aggressively counter the corporate statements. Indeed, consumers themselves can be expected to recognize the self-interested component of corporate speech and discount it accordingly.

In light of the limited state interest, and the concomitant First Amendment interest in fostering robust public debate, the state cannot impose liability for a commercial actor's speech on a matter of public concern in the absence of proof of commercial harm caused by such speech and proof of actual malice. At a minimum, the First Amendment precludes imposition of liability under a strict liability standard for such speech. Otherwise, the public will be deprived of corporate perspectives on matters of social concern, and corporations will be denied the right to compete effectively with advocacy groups and other non-governmental organizations in the policy arena. Indeed, if the California Supreme Court's view of corporate speech were to prevail – and corporations were inhibited from speaking freely on public issues of concern to them – the people would lose an important counter-weight to the power of government, and the constitutional system of democratic and political checks and balances would suffer commensurately.

ARGUMENT

This case arises from the speech of petitioners Nike, Inc., and five of its officers or directors, commercial actors drawn by criticism of Nike's labor practices to participate in the broader public debate on globalization and its impact on social welfare. Accused by advocacy groups of exploiting workers in developing countries, and alleged to exemplify

harms wrought by globalization, Nike responded with public statements defending its treatment of workers and its effect on local economies. The question presented here is whether that corporate "counter-speech" receives the full First Amendment protection traditionally afforded speech in public debate.

The California Supreme Court erroneously held that it does not. Disregarding the fact that petitioners' speech – the subject of intense media scrutiny, investigative reports, and op-ed pieces – was an integral part of a public debate, the court discounted that speech primarily because the corporation is, at bottom, commercially motivated. The court pointed to the combination of three factors that reduced the First Amendment value of petitioners' speech – the commercial identity of the speaker; the intended audience of actual and potential consumers; and the fact that speech about business operations may influence consumer's purchasing decisions. App. at 21a-23a. The court ultimately concluded, "when a corporation, *to maintain and increase its sales and profits*, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech" that is entitled to lesser First Amendment protection. *Id.* at 29a (emphasis added).

But the fact that a commercial actor may speak in furtherance of its own economic interests does not disqualify its speech from the full protection of the First Amendment. The constitutional guarantee of free speech does not tolerate favorites based on the status or motivation of the speaker; one of its fundamental purposes is to protect "the public's interest in receiving information," *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 8 (1986), from a broad array of sources, including for-profit corporations and other commercial entities. Indeed, as this Court has recognized, to hold otherwise would mean that most newspapers and books lack full First Amendment protection because their publishers (and authors) want to make money. See, *e.g.*, *New York*

Times v. *Sullivan*, 376 U.S. 254, 266 (1964). As our nation's historical and contemporary practices make clear, speakers engaged in commerce, advancing facts and ideas that promote their economic self-interest, have long made, and continue to make, valuable contributions to debate on matters of public concern. See *infra*, Part I. Valuing those practices, this Court's precedents establish that the First Amendment fully protects speech on matters of public interest, regardless of the identity of the speaker or the motivation for the speech. See *infra*, Part II.

I. SPEAKERS ADVOCATING THEIR ECONOMIC SELF-INTEREST HAVE LONG MADE, AND CONTINUE TO MAKE, VALUABLE CONTRIBUTIONS TO DEBATE ON MATTERS OF PUBLIC CONCERN.

A. There Is A Long And Venerable History And Tradition In The United States Of Self-Interested Commercial Actors Participating In, And Indeed Leading, Public Debate.

A brief survey of the most influential speech that shaped our nation's early politics and institutions shows the value of public policy debate by self-interested commercial actors addressing matters that directly affect their commercial interests. Far from forming a peripheral or less valued form of speech, as the California Supreme Court concluded in applying the "commercial speech" doctrine, this type of commercially motivated speech in fact has often formed the core of public discourse that our First Amendment traditions most value. At critical junctures in our nation's history, commercial speakers advancing ideological and philosophical claims linked to their commercial self-interest have been among the most influential, not least valuable, of political speakers.

Many of the events leading to our nation's declaration of independence, and the accompanying focus of public debate,

struck directly at the economic interests of important commercial interests in the colonies. The Proclamation of 1763 limited landholders' ability to extend their property holdings west of the Appalachians. The Stamp Act of 1765 taxed commercial and land transactions. The Townshend Act of 1767 taxed principal trading goods, including glass, lead, and, of course, tea. The institutional opposition to British policies, and the increasing self-identification of the colonists as having independent political interests, arose in Boston and Virginia, major trading ports, and elsewhere in large measure in response to these economic restrictions.[2] Indeed, included among the "long train of abuses and usurpations" enumerated in the Declaration of Independence were "cutting off our Trade with all parts of the world" and "imposing Taxes on us without our Consent." *Declaration of Independence*, para. 2 (U.S. 1776).

Speakers reflecting and defending their own commercial interests most directly affected by these British efforts were essential participants in the resulting political debate. Colonists communicated and debated the implications of these measures through an outpouring of pamphlets and broadsides – a tradition that came to encompass *The Federalist Papers* and other commentary on the Constitution. Unlike in eighteenth century England and the United States today, there were few professional editorialists. Instead, the leading editorialists were individuals drawn from the commercial and professional classes.

> The American pamphleteers were almost to a man lawyers, ministers, merchants, or planters heavily engaged in their regular occupations. . . . [U]ntil the crisis of Anglo-American affairs was reached, they had had no occasion to turn out public letters, tracts, and

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[2] *See* R. Middlekauff, *The Glorious Cause: The American Revolution 1763-1789*, at 118-207 (1982); E. Countryman, *The American Revolution* 41-73 (1985).

> pamphlets in numbers at all comparable to those of the English pamphleteers.[3]

Similarly, the events leading to the Constitutional Convention and informing the debates over ratification of the Constitution also threatened the economic interests of important speakers of the time. Shays' Rebellion of 1786-1787 and its threat to order and creditors' rights, together with the Rhode Island paper currency crisis, added urgency to the Convention and served as a backdrop to the ratification debates.[4] Speculation in banking and public securities associated with the States' debt was widespread, and any resolution of that issue, including the eventual assumption of debt by the Federal Government, would directly affect the commercial interests of many of the most outspoken commentators on those subjects.

Many of the most prominent contributors to the political debate of the revolutionary and constitutional periods were associated with commercial interests directly at stake in the debates and events of the time. Included in the Continental Congress and the Constitutional Convention were many landholders, successful merchants, security-holders, and professionals.[5] Those people – who had a variety of commercial interests – contributed in significant part to the debates over the nation's foundation.

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[3] B. Bailyn, *The Ideological Origins of the American Revolution* 13-14 (1967); *see also* A. Schlesinger, *The Colonial Merchants and the American Revolution, 1763-1776* (Atheneum 1968) (1917).

[4] *See* Middlekauff, *supra* note 2, at 600-01, 627-28; J. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 360-99 (1979).

[5] *See generally* F. McDonald, *We the People: The Economic Origins of the Constitution* 73-151 (The Free Press 1986) (1958); C. Beard, *An Economic Interpretation of the Constitution* 38-92 (Transaction Publishers 1992) (1913).

Historians have debated the extent to which, but not the fact that, economic considerations shaped the positions of the principal speakers of the day and the members of the Continental Congress and Constitutional Convention. Whether the Constitution was "an economic document drawn with superb skill by men whose property interests were directly at stake,"[6] or "economic elements were obviously of considerable importance" but manifested themselves in complex and indirect ways,[7] historians generally agree that commercial considerations during the Founding period were inseparable from statements of genuinely held political and ideological views. As one historian has explained, the fact that the colonists' positions may have been "designed simply to further their own economic interests" is unremarkable: "We will see no incongruity in their coupling of principle and self-interest if we remember that constitutional principles have been created and continue to exist for the protection of the people who live under them." E. Morgan, *The Birth of the Republic, 1763-1789*, at 51-52 (3d ed. 1992).

This pattern of "self-interested" commercial speakers addressing and shaping important political issues that directly concern their commercial interests is repeated in major political debates throughout the nation's history. In the 1830s to 1850s, many of the great issues of the day – the creation of the Bank of the United States and tariff policy – revolved around commercial interests, and were debated in large measure by creditors, manufacturers, and traders. From 1885 to 1905, prominent political issues included monetary and credit policies, particularly as they affected agrarian interests, and the emerging industrial economic structure, especially as it affected wages and working conditions. Among the most "self-interested" speakers were the leaders of the farm and labor movements, who, in addressing their commercial

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[6] Beard, *supra* note 5, at 188.

[7] McDonald, *supra* note 5, at 358 (refuting Beard thesis).

interests, were essential to the political debates of the period. In the New Deal era during the 1930s, the robust debate that informed and shaped the more expansive government initiatives would have been inconceivable without the participation of the affected commercial interests, especially major corporations and their leaders. All these participants addressing major political issues were self-interested speakers engaged in what the California Supreme Court characterized as lesser protected "commercial speech." Judged by the standards of the First Amendment, however, they are political speakers engaged in "core" protected speech.

Finally, individuals have long participated in discussion on public affairs as members and leaders of corporations *per se*. The first significant commercial corporations in the new nation, the Massachusetts Bay Company and the Virginia Company, not only served as the vehicles for settling two leading colonies, but also provided the mechanism for the new colonists to debate and develop the political institutions that proved so important to the emerging nation.[8] The debates and experiments in collective action during the Revolution formed the basis for the subsequent development of the corporate form,[9] and the corporation became an important mechanism for organizing and coordinating a variety of endeavors in the following decades, including the infrastructure projects that were often a subject of public controversy in the Nineteenth Century.

Toward the end of that century, the railroad corporations became a principal source of political controversy, and their leaders and their opponents debated a broad range of public

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[8] *See* J. Beatty, *Introduction: "Of a Huge and Unknown Greatness," in Colossus: How the Corporation Changed America* 3 (J. Beatty ed., 2001) ("*Colossus*"); A. Innes, *From Corporation to Commonwealth*, *in Colossus* 17.

[9] P. Maier, *The Revolutionary Origins of the American Corporation*, 50 Wm. & Mary Q. 51 (1993).

issues that shaped the nation. The Court had by this time recognized the corporation's role in coordinating its members' activities and protecting their interests, through recognition that the Fourteenth Amendment's protection of "persons" extended to protection of the activities of corporations. See, *e.g.*, *Chicago, Milwaukee & St. Paul Ry.* v. *Minnesota*, 134 U.S. 418, 456-59 (1890). Corporations thereafter increasingly became the vehicle to organize non-profit activities as well as commercial activities, and in both forms continued to receive the Court's protection when their members used them to engage in activities protected by the Constitution. See *infra* pp. 16-17. Our nation's historical tradition and practices thus confirm that the public advocacy of interests, including commercial interests, through the corporate form provides no basis for reduced First Amendment protection.

B. Public Policy Debates Today Continue To Benefit From The Contributions Of Commercially Motivated Speakers.

Contemporary debates on public policy issues confirm the continuing importance of contributions from "self-interested" commercial actors. As the social entities that are the subject of many laws and regulations, businesses play a critical role in informing public debate on the implications and effects of particular policy choices. Put another way, "[business] corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Pacific Gas & Elec.*, 475 U.S. at 8 (quoting *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978)). Indeed, for many issues of public concern, meaningful debate would be impossible without active participation by commercial leaders, who often necessarily have direct economic interests in the debate's outcome.

Commercial entities and their leaders contribute to a wide range of public policy debates, and often their most important

contributions address how a policy would affect their own business's processes, products, or economic interests – even when their speech arises from a concern for the public interest. Issue analyses and policy recommendations by task forces of The Business Roundtable illustrate the breadth of these contributions. For example, business leaders have unique insights into fiscal policy as it affects the economy, and education as its affects workforces.[10] Debates surrounding international trade, corporate governance, or health and retirement would be impoverished without the active contributions and perspectives of business leaders.[11] Business leaders are active participants in public policy debates surrounding security issues, environmental regulation, and civil justice reform,[12] and their contributions are often valuable because of – not despite – those leaders' elaboration of the commercial interests at stake.

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[10] The Business Roundtable, for example, has issued the following reports, *Financial Impact of the No Child Left Behind Act on the State of New Hampshire* (Feb. 19, 2003), *Immigration Report* (Dec. 2, 2002), and *K-12 Education Reform* (Feb. 7, 2001), all of which are available at http://www.brtable.org/issue.cfm/3/0/0/49.

[11] Relevant reports issued by The Business Roundtable include *Corporate Social Responsibility in China: Practices by U.S. Companies* (Feb. 16, 2000); *Beyond the Balance Sheet: How U.S. Companies Bring Positive Change to Latin America* (Aug. 2, 2001); *50 State Reports on Effect of Trade with China* (Apr. 21, 2000); *Re: Release No. 33-8514, Strengthening the Commission's Requirements Regarding Auditor Independence, File No. S7-49-02* (Jan. 13, 2003); *Consumer Protection and Quality in the Health Care Industry* (Sept. 10, 1997); and *Principles for Retirement Savings Reform* (Mar. 27, 2002), all of which are available at http://www.brt.org.

[12] The Business Roundtable, for instance, issued a public statement, *BRT Supports the Teacher Protection Act of 2001* (May 2, 2001), *available at* http://www.brtable.org/issue.cfm/10/0/0/540, and a variety of reports on the environment, including *Unleashing Innovation: The Right Approach to Global Climate Change* (Apr. 4, 2001) and *Principles for the Design of an Emissions-Credit Trading System for Greenhouse Gases* (Jun. 1, 1999). *See* http://www.brt.org/issue.cfm/4.

Debate addressing technology and the digital economy provides an example of how business leaders' contributions are essential to public policy formulation. The leaders of Sun Microsystems, Microsoft, Intel, AOL Time Warner, and Cisco Systems have widely divergent views on technology and related market issues but each has contributed to raising, shaping, and informing enormously varied and important public policy issues, ranging from investment incentives to privacy, public access, and market regulation. See, *e.g.*, K. Auletta, *World War 3.0: Microsoft v. the U.S. Government and the Battle to Rule the Digital Age* (2001); A. Gawer & M. Cusumano, *Platform Leadership: How Intel, Microsoft and Cisco Drive Industry Innovation* (2002). Not coincidentally, those issues also directly affect those corporations' economic interests and concern their products and processes.

Debates involving national energy policy, for example, have also benefited from the multiple and often competing perspectives advanced by "self-interested" commercial speakers. Shortly after the announcement of the current Administration's proposed national energy plan, a broad array of business groups formed the "Alliance for Energy and Economic Growth" and began using mass mailings, Internet postings, and talk radio to generate public support for the plan. See N. Bendavid, *Battle Lines Drawn Over Energy Plan: Increased Drilling Sharpens Debate*, Chi. Trib., May 4, 2001, at 1. Another group, the American Council for an Energy-Efficient Economy, which is funded in part by corporations including Allied Signal, Inc., Boeing Company, and Maytag Corporation, employed similar means to criticize the President's plan for not doing enough to encourage energy-efficient technologies. See Press Release, Am. Council for an Energy-Efficient Econ., Bush-Cheney Energy Plan Misses the Mark on Energy Efficiency (May 17, 2001), *available at* http://www.aceee.org/press/enrgypln.htm. In participating in that robust debate, companies advanced competing factual claims about, among other things, the costs

and feasibility of using energy-saving technologies in performing their business operations.

The numerous federal and state statutes that encourage or even mandate the involvement of business interests in the development of government policies and programs formally recognize the value of contributions to public debate by self-interested commercial actors. In establishing negotiating objectives and bargaining positions for international trade agreements, for example, the President is required to consult with representatives of both the non-Federal government sector and the private sector. See 19 U.S.C. § 2155(a)(1). Similarly, to determine the most effective means of sharing technology developed by the government with the private sector, federal law directs the Federal Laboratory Consortium for Technology Transfer to "seek advice" from, among others, "representatives of . . . large and small business." See 15 U.S.C. § 3710(e)(1)(J).[13]

As they have throughout our nation's history, "self-interested" commercial speakers thus continue to shape and inform a broad range of public policy issues. The value of their contributions often arises precisely because directly affected economic interests inform their views. Cf. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974) ("personal stake" necessary for purposes of standing so that party can adequately represent a view and thereby assist court's consideration of an issue). The California Supreme Court's opinion, by contrast,

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[13] Many similar state statutes exist. *See*, *e.g.*, California Hazardous Waste Source Reduction and Management Review Act of 1989, Cal. Health & Safety Code § 25244.15.1(a) (establishing a committee including, among others, "[t]wo representatives of industry," and "[o]ne representative of small business"); Tex. Rev. Civ. Stat. Ann., art. 5221f-1, § 5(a) (creating an industrial building code council consisting of twelve members, including three to represent the housing and building industries, three to represent general contractors, and three to represent professionals associated with the building trade).

underprotects, and hence threatens to chill, that speech because of the commercial interest and expertise that so often enhance "core" First Amendment debate.[14]

II. THE FULL PROTECTION OF THE FIRST AMENDMENT EXTENDS TO SPEECH BY COMMERCIAL ACTORS ON MATTERS OF PUBLIC CONCERN, INCLUDING MATTERS IN WHICH THEY HAVE AN ECONOMIC SELF-INTEREST.

The decision below mechanically assumed that any factual representations by a commercial entity about its products, services, or business operations that are made for the purpose of advancing the entity's commercial self-interest are disqualified from the full protection of the First Amendment. But debate on matters of public concern is core First Amendment speech, and remains so even when the speaker is

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[14] The California Supreme Court repeatedly dismissed any concerns about the danger of "chilling" the speech of commercial entities by relying on *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976), and *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 576 (2001) (Thomas, J., concurring in part and concurring in the judgment), for the proposition that the desire for economic profit reduces the likelihood of chilling. *See* App. at 20a, 22a, 27a, 29a. Yet those cases concerned the potential chill on traditional price and brand advertising. In numerous other contexts, this Court has acknowledged the significant risk that, notwithstanding their economic motivation to speak, commercial entities that face potential liability will have their speech chilled. *See*, *e.g.*, *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988) (rule imposing strict liability on commercial publisher for "false factual assertions would have an undoubted 'chilling' effect"); *Sullivan*, 376 U.S. at 278-79 (same); *see also First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 782 n.18 (1978) (lack of clear standards associated with criminal liability for certain speech may lead business corporations to restrain from engaging in even legally permissible speech); *Smith* v. *California*, 361 U.S. 147, 153-54 (1959) (risk of criminal liability for sale of obscene writings will lead commercial bookseller to self-censor and his "timidity" in the face of strict liability will lead him to discontinue selling both obscene and non-obscene writing).

a commercially motivated actor joining a public debate over its own business practices. Treating the speech at issue in this case as core First Amendment speech ensures the breathing space essential to robust public debate. At the same time, such treatment is more than adequate to protect those consumers whose purchasing decisions might be influenced by that speech.

A. The First Amendment Indisputably Protects The Right Of Commercial Actors To Participate Fully In Debate On Matters Of Public Concern.

Speech on "'matters of public concern'" is "at the heart of the First Amendment's protection." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978) (quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 101 (1940)). That speech embraces "'all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period,'" *id.* (quoting *Thornhill*, 310 U.S. at 102) – which can include, of course, information about a company's labor practices. See *Thornhill*, 310 U.S. at 103 (emphasizing the constitutional guarantee of free discussion about "the practices in a single factory [which] may have economic repercussions upon a whole region and affect widespread systems of marketing"). Because "speech on public issues occupies the '"highest rung of the hierarchy of First Amendment values,"'" it "is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey* v. *Brown*, 447 U.S. 455, 467 (1980))).

As the Court has made clear on several occasions, the fact that speech may be made for commercial purposes does not thereby diminish the protection accorded that speech. See *Ginzburg* v. *United States*, 383 U.S. 463, 474 (1966) ("[C]ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."). In *New York Times* v. *Sullivan*, 376 U.S. 254

(1964), for example, the Court rejected the contention that speech that was part of a "paid, 'commercial' advertisement" necessarily fell outside the protection of the First Amendment. *Id.* at 265. By its very nature, the speech at issue "communicated information," "expressed opinion," and addressed "grievances" and "claimed abuses" – traits that apply to the speech at issue in this case – and was therefore entitled to full First Amendment protection. *Id.* at 265-66. That an advertisement's publication may have been motivated by financial gain was "immaterial" for First Amendment purposes, the Court explained, as is the fact that publishing newspapers and books is also commercially motivated. *Id.* at 266 (citing, *inter alia*, *Smith* v. *California*, 361 U.S. 147, 150 (1959) (protecting First Amendment rights of booksellers)); see also *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) ("[E]conomic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged.").

The Court's holding in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), confirms that basic principle. There, the Court held that a publicity campaign by a group of railroad companies that sought to influence legislation and law enforcement practices did not violate the Sherman Act. See *id.* at 145. The fact that the railroad companies may have sought to destroy their business competitors, the Court emphasized, did not alter that analysis. If the Sherman Act were to prohibit such activity, the Court made clear, it would raise "important constitutional questions." *Id.* at 138.

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would . . . deprive the government of a valuable source of information and, at the same time, deprive the people of their right to

> petition in the very instances in which that right may be of the most importance to them.

Id. at 139.

This Court has further established that the commercial identity of a speaker does not diminish the level of protection afforded its speech. See *Bellotti*, 435 U.S. at 777; *Pacific Gas & Elec.*, 475 U.S. at 8. In *Bellotti*, this Court held unconstitutional a state statute prohibiting business corporations from making any expenditures for the purpose of influencing any voter referenda except those that materially affect the property, business, or assets of the corporation. See *Bellotti*, 435 U.S. at 767, 795. In emphasizing the First Amendment's purpose of protecting the public's interest in receiving information, the Court made clear that the identity of the speaker was irrelevant: "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.* at 777. Speech that is otherwise entitled to the full protection of the First Amendment does not "lose[] that protection simply because its source is a corporation." *Id.* at 784.

Accordingly, neither the fact that a speaker is motivated by economic self-interest nor the fact that the speaker is engaged in commerce affects the appropriate level of First Amendment protection afforded particular speech. Instead, the nature of the speech matters, and it is well-established that speech on matters of public concern receives the First Amendment's full protection. Thus, when commercial entities participate in debate on matters of public concern, the First Amendment fully protects their speech, even when it is made to promote the speaker's commercial self-interest.

B. The Fact That A Commercial Actor's Speech On Matters Of Public Concern Includes Discussion Of The Actor's Own Business Operations Does Not Reduce The Level Of Protection Afforded That Speech.

1. The "commercial speech" doctrine is inapplicable to speech on matters of public concern. That doctrine emerged because this Court concluded that traditional advertising of products and services – previously thought to be outside the reach of the First Amendment – is entitled to constitutional protection. In effect overruling *Valentine* v. *Chrestensen*, 316 U.S. 52, 54-55 (1942), which held that commercial advertising lacks any First Amendment protection, the Court recognized in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-65 (1976), and in numerous subsequent cases that such speech provides valuable information to the public and thus falls within the domain of constitutionally protected speech. See, *e.g.*, *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1503 (2002); *Rubin*, 514 U.S. at 481-82; *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980). In light of the government's legitimate interest in regulating the commercial transactions themselves and, in particular, in protecting consumers from fraudulent, or potentially fraudulent, business practices, the Court has also recognized that the government has greater power to regulate "commercial speech" than many other forms of speech. See, *e.g.*, *Bolger* v. *Youngs Drug Prod. Corp.*, 463 U.S. 60, 64-65 (1983); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 426 (1993).

This Court has never suggested, however, that the lesser protection afforded "commercial speech" applies whenever a commercial actor speaks about its own business operations, even when those operations have themselves become the subject of intense public debate and concern. The

commercial speech doctrine evolved in order to heighten protection for speech proposing consumer transactions that had previously been thought to merit no protection. *Virginia Bd.*, 425 U.S. at 762-65. The doctrine was never intended to limit protections for speech that has always been recognized as fully protected by the First Amendment simply because the speaker is commercially motivated.

2. When a business labels its products or engages in traditional advertising about the price or performance of a product or service, the state has a strong and legitimate interest in protecting consumers against false or inherently misleading statements. By contrast, when a commercial entity participates in debate on public policy issues and makes representations about its business operations, and is not directly or principally proposing a sales transaction, the state's interest in protecting consumers from commercial harms is significantly diminished. Whereas, in the former context, the state may go so far as to prohibit all false or deceptive statements, see *id.* at 771-72, in the latter context, the First Amendment's full protections apply and necessarily preclude the imposition of strict liability, or liability on the basis of mere negligence, for false and misleading statements. See *infra* pp. 22-24.

The state's interest in protecting consumers from commercial harms is most important when commercial actors make false claims about their products or services in the course of proposing transactions and individuals lack the information or sophistication to evaluate those claims. See *In re R.M.J.*, 455 U.S. 191, 200 (1982); *Bates* v. *State Bar*, 433 U.S. 350, 383 (1977). "Transaction-driven speech usually does not touch on a subject of public debate, and thus misleading statements in that context are unlikely to engender the beneficial public discourse that flows from political controversy." *Rubin*, 514 U.S. at 496 (Stevens, J., concurring). The need for the government to take steps to

ensure that commercial actors speak truthfully is particularly important in that context.

In contrast, when a commercial actor participates in debate on a matter of public concern and is not directly proposing a commercial transaction to consumers, the state's interest in protecting consumers from harm resulting from false claims is considerably diminished. There, counter-speech is likely to inform and protect those consumers whose purchasing decisions might otherwise be influenced by such claims. Given this built-in protection, the state's interest in ensuring the truthfulness of claims made as part of a public debate over a company's business operations does not outweigh the First Amendment interest in ensuring ample latitude for public debate, free from the chilling effect of potential liability for mere argumentative errors or excesses, and the accompanying burdens of defending against those claims. See *supra* note 14. In such circumstances, the state cannot, consistent with the First Amendment, impose liability on commercial actors for their speech without proof of commercial harm caused by the falsehood, and proof of actual malice. At a minimum, the First Amendment interests at stake preclude any imposition of damages under a strict liability standard for a commercial entity's statement in the course of public debate that does not directly propose a commercial transaction.

In this case and for public policy debates generally, counter-speech, rather than damages liability, provides more than adequate protection against the possibility that any false or misleading claims made as part of a public debate will influence the purchasing decisions of some consumers. Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (state interest in compensating individuals for defamatory falsehoods less strong when opportunities for counter-speech can be expected). As Justice Harlan has explained, "[F]alsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas."

Time, Inc. v. *Hill*, 385 U.S. 374, 407 (1967) (Harlan, J., concurring in part and dissenting in part).

In contexts like this one, powerful counter-speech may be presumed. Critics and activists who have questioned or attacked a company's business operations are certain to respond to potential misstatements by refuting the misstatements with additional facts, or information or opinion, or by conducting or demanding further inquiry on the issue. Organizations such as the media are likely to publicize the competing claims or to undertake additional investigation to assess those claims.[15] Indeed, that is precisely what took place in this case. See App. at 3a. Consumers who would decline to purchase products on moral or political grounds linked to the company's operations are, as well, particularly likely to discount the company's claims as self-interested. California does not need to derogate and inhibit that speech through an expanded "commercial speech" doctrine. Especially when a company's practices have been challenged, those consumers can recognize the company's economic self-interest and take that factor into account when evaluating the company's claims. Cf. *Bellotti*, 435 U.S. at 791-92 & n.32 (noting that listeners may take speaker's identity into account when evaluating messages); *Buckley* v. *Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (same).

Where, as here, a company's business operations have themselves become the subject of intense public policy debate, there is simply no concern that an advertiser is seeking to immunize false or misleading product information from government regulation "simply by including references to public issues," *Bolger*, 463 U.S. at 68. In this case, the company has been drawn into public debate by others and is

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[15] *See* Brief *Amici Curiae* of Thirty-Two Leading Newspapers, Magazines, Broadcasters, and Media-Related Professional Associations In Support of Petition for a Writ of Certiorari at 12-17, *Nike, Inc.* v. *Kasky*, No. 02-575 (U.S. 2002) (arguing that media will investigate contested claims about business operations and did so in this case).

defending its own practices. Petitioners are clearly responding to organized, widely publicized attacks by advocacy groups and non-governmental organizations, and there is no reasonable argument that the company is merely alluding to public issues to secure heightened protection for its product advertising or promotion.

In contexts in which companies are participating in public debate about deeply contested social and political issues, claims that a company might make about its business operations are thus likely to be the subject of speech and counter-speech. In those circumstances, the First Amendment presumes that the "marketplace of ideas" will best ensure that truth will emerge. See *Consolidated Edison Co. of New York, Inc.* v. *Public Serv. Comm'n*, 447 U.S. 530, 534 (1980) ("'[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.'" (quoting *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))). To permit the government to burden the speech of commercial entities in public debate – as California did here – violates the basic constitutional principle that "the people in our democracy," and not the government, "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Bellotti*, 435 U.S. at 791; see also *Sullivan*, 376 U.S. at 270 ("The First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" (quoting *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Learned Hand, J.))).

3. Because "erroneous statement is inevitable in free debate," this Court has repeatedly made clear, "it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive'" *Sullivan*, 376 U.S. at 271-72 (alteration and citation omitted); see also *Gertz*, 418 U.S. at 341 ("[W]e protect some falsehood in order to protect speech that matters"). Yet society need not

tolerate calculated falsehoods. See *Time, Inc.*, 385 U.S. at 389 ("[T]he constitutional guarantees [for speech and press] can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function."). The conclusion that the speech at issue here does not constitute "commercial speech" and is entitled to the full protection of the First Amendment does not mean that the state lacks all power to prevent intentional misrepresentations.

This Court's exposition of the First Amendment limits on damages for defamatory falsehoods is particularly instructive here. There, imposing damages liability for speech requires accommodating the competing state interest in compensating individuals for harm to their reputation and the First Amendment interest in protecting that speech. See *Gertz*, 418 U.S. at 341-44; *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 756-57 (1985). When discussion addresses matters of public concern, the speech is at the heart of the First Amendment and is entitled to special protection, *Dun & Bradstreet, Inc.*, 472 U.S. at 759, and thus speakers may not be held strictly liable for defamation. See *Gertz*, 418 U.S. at 347; *Sullivan*, 376 U.S. at 279-80.

The appropriate standard of liability for defamatory falsehoods also turns on whether the allegedly defamed individual participates in the public arena or not. The state interest in compensating public figures and officials for harm to their reputation is less important than the state interest in so compensating private individuals in part because of the greater access of public figures and officials to channels of communication and their concomitant ability "to contradict the lie or correct the error." *Gertz*, 418 U.S. at 344. In light of that difference, among others, the Court has held that a public figure or official may not recover damages for defamation unless he or she proves, with clear and convincing proof, that the statement was made with "'actual malice,'" or, in other words, "with knowledge that it was false or with reckless disregard of whether it was false or not," see

Sullivan, 376 U.S. at 279-80; *Associated Press* v. *Walker*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result) (four additional Justices joining in the Chief Justice's position on this issue). A private individual, by contrast, may recover actual damages upon a showing of negligence (or a higher standard of liability), but may not recover presumed or punitive damages absent a showing of "actual malice." See *Gertz*, 418 U.S. at 347.

Here, the balance in favor of First Amendment interests is at least equivalent to that involving libel damages for public figures or officials. In both cases, matters of public concern are involved, and thus the First Amendment interest in protecting speech is at its greatest. The state's interest in preventing commercial harms caused by false statements made as part of a public policy debate about a company's business operations is certainly no greater than the state's interest in protecting against harm to the reputation of public figures, an interest that is adequately protected by the actual malice standard. With the full participation of advocacy groups and the media, the marketplace of ideas is particularly able to redress any commercial harms that are alleged to stem from public policy debates. Because the value of the speech is so great and the state's interest is more limited, the clear and convincing actual malice standard should be added to the First Amendment protections linked to proof of harm and causation. At a minimum, the state may not, consistent with the First Amendment, hold commercial entities strictly liable for false representations about their business operations in the context of public debate.

4. Finally, in the marketplace of ideas, commercial entities frequently vie with editorialists, public advocacy groups, and other non-governmental entities to compete for the hearts and minds of the public concerning issues that affect the entities' economic interests. It would violate the First Amendment's prohibition on viewpoint discrimination for the government to permit one side of public debate – the

commercial actor's critics – to engage in full, wide-open, and robust debate while subjecting the commercial actor to a different and more restrictive standard of conduct for speech. See *R.A.V.* v. *City of St. Paul, Minn.*, 505 U.S. 377, 383-84 (1992); *Bellotti*, 435 U.S. at 785-86. By "rais[ing] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994) (internal quotation marks omitted), such regulation would harm not only the commercial speaker, but also the public itself.

Corporations are, in fact, similarly situated to other non-governmental organizations in that they all play a crucial role in civil society, promoting what de Tocqueville called America's "circulation of ideas." 2 A. de Tocqueville, *Democracy in America* 109 (P. Bradley ed., 1948) (1835); see also *Pacific Gas & Elec.*, 475 U.S. at 8 ("Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas.'" (quoting *Bellotti*, 435 U.S. at 783)). Eliminating, or even muffling, the voice of corporations "is either to augment that always dominant power of government or to impoverish the public debate." *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 694 (1990) (Scalia, J., dissenting).

According to the California Supreme Court, a private attorney general may hold a commercial entity strictly liable for making false or misleading statements about its products, services, or business operations in public debate, see App. at 5a, 29a-30a; by contrast, a non-commercial entity propounding false or misleading statements about those same products, services, or business operations may not be held strictly liable by anyone. As this regime "give[s] one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Bellotti*, 435 U.S. at 785-86 (footnote omitted).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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February 28, 2003