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 AMICUS CURIAE THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

This brief is respectfully submitted on behalf of **Consumer Attorneys of California**.[1] **Consumer Attorneys of California** is a voluntary membership organization of approximately 3,000 consumer attorneys practicing throughout California. The organization was founded in 1962 and its members frequently utilize California's Unfair Competition Law (the "UCL," California Business & Professions Code §§ 17200, *et seq*.) to address consumer fraud practices. **Consumer Attorneys of California** has taken a leading role in advancing and protecting the rights of consumers in both the courts and the Legislature and is vitally interested in assuring the continuing ability to address false and misleading statements disseminated by businesses in the state and in assuring that the UCL remains a strong and effective means of addressing false advertising.

SUMMARY OF ARGUMENT

In their briefs, both Petitioner Nike, Inc. and the United States as Amicus Curiae assert that the First Amendment's protections cannot be effectively realized where a private party brings an action under California Business & Professions Code §§ 17200, *et seq.* (generally referred to as the Unfair Competition Law, or the "UCL"). (*See* Nike's Brief for the Petitioners, pp. 37-49 and brief of the United States.)

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1. Petitioner and Respondents have filed a blanket consent to the filing of amicus briefs. Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

These arguments, however, misconstrue the meaning, effect and power of the UCL. After first admitting that the government has the power to regulate false, deceptive or misleading speech, the Solicitor General then goes on to assert that the First Amendment does not, however, "allow States to create legal regimes in which a private party who has suffered no actual injury may seek redress on behalf of the public for a company's allegedly false and misleading statements." (Brief of the United States, p. 8.) Further, the Solicitor General argues, the requirement that in "private causes of action" actual, personal harm must be demonstrated by the plaintiff is necessary to "ensure that any restriction on speech is justified." (Brief of the United States p. 8.)

But this argument is predicated on several major false assumptions. The first is that the cause of action alleged is a "private cause of action" brought by a "private party." Under the statutory scheme embodied in California's UCL, that is simply not the case. Rather, the action is a representative action brought ***on behalf of the general public***. (California Business & Professions Code § 17204; *Kraus v. Trinity Management Services, Inc.,* 23 Cal. 4th 116, 126, 137 and 138 (n.18), 96 Cal. Rptr. 2d 485, 999 P.2d 718 (2000).) It is not a private action, by a private party, it is a public civil enforcement action brought by a public representative. That public representative, under the California statute, may be the Attorney General, a district attorney or a city attorney. (California Business & Professions Code § 17204.) The public representative may also be an individual or entity. (*Id.*) But whoever the representative is, they are not prosecuting a private action, but a public action.

The second false assumption embedded in the Solicitor General's arguments is that the courts will necessarily litigate

UCL actions differently, depending on the representative. The Solicitor General apparently has no complaint with a governmental agency or officer bringing a UCL action – as evidenced by its own support of actions under the essentially-identical FTC Act. But the Solicitor General apparently believes that when an individual brings exactly the same case under exactly the same allegations of fact, and based on exactly the same evidence, there will be different and lesser due process, First Amendment and other protections for the defendant than if a government actor is bringing the case. There is, however, neither logical justification nor empirical evidence to support that conclusion.

The Solicitor General's third false assumption is that because the individual plaintiff has not alleged direct harm to himself, no harm has occurred. The Solicitor General demands that not only must a UCL plaintiff allege that the statements are false, but that the plaintiff personally relied on them and suffered a personal injury – even though there is no requirement under the Solicitor General's analysis that a government actor be required to make those same allegations in the same context. Moreover, the Solicitor General's predicate completely fails to take into the account the underlying purpose and effect of California's UCL, i.e., to protect both competitors and the general public from the harm that necessarily and inherently occurs when a business – any business – makes misleading and deceptive statements. Indeed, the Unites States's position would return us to the long-abandoned days of *caveat emptor*, "let the buyer beware," and would dispose of and dispense with decades of consumer-interest legislation.

The Solicitor General's arguments also ignore the fact that while the UCL's sweep and standing provisions are

broad, its remedies provision is very shallow. In fact, all that is available under the UCL are equitable remedies, i.e., injunction and – in the absence of a certified class action – a very limited form of restitution. (California Business & Professions Code § 17203; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 179, 83 Cal. Rptr. 2d 548, 973 P.2d 527; *ABC Internat. Traders, Inc. v. Matsushita Electric Corp.*, 14 Cal. 4th 1247, 1268, 61 Cal. Rptr. 2d 112, 931 P.2d 290 (1997).) Damages are not recoverable at all. (*Chern v. Bank of America*, 15 Cal. 3d 866, 875, 127 Cal. Rptr. 110, 544 P.2d 1310 (1976).) Because of these limited remedy provisions, the Solicitor General's personal harm proposal is utterly unnecessary to protect either speech or speakers.

Finally, the Solicitor General's arguments also overlook the simple reality that whether brought by a private party who suffered individual harm or whether brought by a private attorney general, no regulation occurs and no remedies – however limited – are imposed, unless it is proven that, in fact, the speech is false, deceptive or misleading. Either way, the same due process and procedural protections remain in place: Legal power is limited to regulating only false, deceptive or misleading speech – which even the Solicitor General, under this Court's prior rulings, must concede is appropriate.

Thus, the entire foundation for these arguments is built on unjustified assumptions, insupportable presumptions and indefensible supposition. As such, these arguments should be disregarded and this Court's analysis should be focused on the real – and very narrow – issue presented in this case: Whether – as specifically and explicitly alleged in

this action – a commercial business's false and misleading statements about its own operations which were made ***for the purpose of promoting its own products*** constitutes commercial speech.

ARGUMENT

I.

SINCE EVERY VIOLATION OF CALIFORNIA'S UCL CAUSES INHERENT HARM TO COMPETITORS OR THE PUBLIC, FIRST AMENDMENT PROTECTIONS ARE NOT IMPROPERLY ABROGATED OR LIMITED IN A UCL ACTION BROUGHT BY A PRIVATE ATTORNEY GENERAL

The Solicitor General's arguments are predicated on its erroneous presumption that, absent proof of harm by a private plaintiff, the First Amendment precludes regulation of even false and misleading commercial speech. (Brief of the United States, p. 10.) But that argument ignores the reality that harm is inherent in an action brought under California's UCL.

Over six decades ago, the California Legislature established – first under Civil Code section 3389, which was later re-enacted as Business & Professions Code section 17200, et seq. – a public right of action, enforceable in equity, to enjoin unfair business competition. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 567, 71 Cal. Rptr. 2d 731, 740 (1998).) Indeed, the UCL was patterned after the United States's own, similar FTC Act. (*Rubin v. Green*, 4 Cal. 4th 1187, 1200, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993).)

But the fact that the action is directed toward unfair business ***competition*** does not restrict its application only to situations in which business competitors are harmed. Indeed, the goal of the act is much broader and is intended to address the general societal harm that results when business enterprises act illegally or unethically. As noted by the California Supreme Court in *People ex re. Mosk v. National Research Co. of Cal.*, 201 Cal. App. 2d 765, 770, 20 Cal. Rptr. 516, 520 (1962):

> Historically, the law of unfair competition and of trademark infringement evolved in the general field of torts. [Fn. Omitted] It was concerned primarily with wrongful conduct in commercial enterprises that resulted in business loss to another, ordinarily by the use of unfair means in drawing away customers from a competitor. With passage of time and accompanying epochal changes in industrial and economic conditions, the legal concept of unfair competition [fn omitted] broadened appreciably. This was occasioned, according to the Restatement, partly by the flexibility and breadth of relief afforded by equity, and partly by changing methods of business and changing standards of commercial morality. "**[T]he tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade. *The tendency still persists***."

(Bold added, italics added by *Mosk* court.)

And as more recently noted by the California Supreme Court in *Bank of the West v. Superior Court (Industrial Indemnity Co.),* 2 Cal. 4th 1254, 1264, 10 Cal. Rptr. 2d 538, 544 (1992):

> The primary purpose of these statutes was to "extend[ ] ***to the entire consuming public*** the protection once afforded only to business competitors." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d 94, 109, 101 Cal. Rptr. 745, 496 P.2d 817, interpreting Civ. Code, former § 3369.)

(Emphasis added.)

The Solicitor General's argument in this case essentially stands for the proposition that false, deceptive and misleading commercial speech does not, in and of itself, cause any "harm," and is therefore not actionable unless it causes pecuniary damage to an identifiable person. That position is naive. Indeed, as the California Supreme Court has said, "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." (*Vasquez v. Superior Court*, 4 Cal. 3d 800, 808, 94 Cal. Rptr. 796, 484 P.2d 964, 968 (1971); *Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442, 451, 153 Cal. Rptr. 28, 591 P.2d 51 (1979).) As the court went on to note in *Fletcher*, "our concern with thwarting unfair trade practices has been such that we have consistently condemned not only those alleged unfair practices which have in fact deceived the victims, but also those which are likely to deceive them." (*Id.*)

As one commentator has noted, "if truthful informative advertising is an unequivocal social good, false advertising is unequivocally bad. In the short run, deceptive advertising injures consumers and competitors. In the long run, false advertising results in a reduction of product quality and a misallocation of resources. If left unchecked, deceptive advertising may eventually undermine the entire competitive system." (Lee Goldman, *The World's Best Article on Competitor Suits for False Advertising*, 45 Fla. L. Rev. 487, 492 (July, 1993).) Indeed, in direct conflict with the underlying predicate for the Solicitor General's argument here that, in the absence of a direct harm to an individual plaintiff, there is no need or ability to regulate false advertising, the same commentator notes that "even if a product is effective and worth the price charged, some, including the Supreme Court and the FTC, believe that false advertising still injures the consumer. They maintain that the seller's failure to deliver the bargained-for goods and the consumers' consequent frustrated expectations constitutes real, albeit nonquantifiable, harm." (*Id.*, at 493; citing to *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934) and Roger E. Schecter, *The Death of the Gullible Consumer: Towards a More Sensible Definition of Deception at the FTC*, 1989, U. Ill. L. Rev. 571, 580.)

The impact of false advertising cannot be overstated. In 1999, total personal consumption expenditures reached $6.2 ***trillion*** dollars. (See U.S. Census Bureau, 2001 Statistical Abstract of the United States, p. 423, Chart No. 648.) As noted in Charles Shafer, *Developing Rational Standards for An Advertising Substantiation Policy*, 55 U. Cin. L. Rev. 1 (1986), a "substantial portion of those

consumer purchases result in some sort of dissatisfaction" which, in turn,

> "is a serious societal problem for a variety of reasons. It indicates a misallocation of scarce resources. It can be a significant factor in producing the perception that the economic and political institutions are unfair, ineffective, or unresponsive. That perception can have wide ranging political ramifications. Finally, it may be an indication of genuine political and economic unfairness."

(*Id.* at 1-2.)

Clearly, even if it is impossible to quantify the harm false advertising may do to a single individual, its existence in the marketplace inflicts a powerful harm on society in general. Thus, it is insupportable for the Solicitor General to argue that First Amendment protections should be unrestricted, even where admittedly false commercial speech is involved, in the absence of individualized injury to a particular plaintiff. As this Court has previously noted, it is extremely important that "the stream of commercial information flow cleanly as well as freely." (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).) That goal can best be achieved where every form of false commercial speech can be addressed through legal actions, even when there is no evidence of harm to an individual person.

Since harm to competitors, society and the general public is inherent whenever false advertising occurs, there is ample

justification for permitting the state to regulate such conduct even where no identifiable harm to an identifiable individual exists.

II.

THE FIRST AMENDMENT'S PROTECTIONS CAN BE FULLY, FAIRLY AND PROPERLY PROVIDED IN A UCL ACTION PROSECUTED BY A PRIVATE ATTORNEY GENERAL

Contrary to the Solicitor General's assertions in its briefing, a UCL action is not a "private right of action" brought by a "private party." It is nothing more – and nothing less – than a representative action, one brought on behalf of the general public. The action can be brought by statutorily delineated representatives. (California Business & Professions Code § 17204.) The fact that the plaintiff in a UCL action is, in fact, acting as a representative has been repeatedly noted by the California courts. (*Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 126, 137, 138 (n.18); *Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1133-1134 (2001); *Massachusetts Mutual Life Ins. Co. v. Superior Court (Karges)*, 97 Cal. App. 4th 1282, 1290, n.3 (2002).)

And though that statutory delineation is broad, it is, nonetheless, not unbounded. As the California Supreme Court has noted, that representative has duties and responsibilities and must be a competent representative. (*Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 138 (2000); *see also Rosenbluth International, Inc. v. Superior Court (Serrano)*, 101 Cal. App. 4th 1073 (2002).)

This type of private attorney general concept has a decades-long history and has been embraced by Congress as well as this Court. Since the inception of the concept in the context of the New Deal regulatory provisions as established in *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), it has been legislatively endorsed by Congress on numerous other occasions in various other contexts, including the environmental, civil rights, qui tam and class action arenas. (*See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727 (1972); *NAACP v. Button*, 371 U.S. 415 (1963); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980).)

Although the private attorney general concept has evolved over the decades (*see, e.g.*, Bryant Garth, Ilene H. Nagel, S. Jay Plager, *The Institution of the Private Attorney General: Perspectives From An Empirical Study of Class Action Litigation*, 61 S. Cal. L. Rev. 353 (January, 1988)) and has in some respects fallen into disrepute (*see, e.g.*, Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 WTR law & Contemp. Probs. 179 (Winter 1998)), there are still sound public policy reasons why the concept remains not only a useful but vital tool in the justice system – and one whose utility should not be circumscribed, but expanded. (Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of a Businesslike Government*, 50 Am. U.L. Rev. 627, 681, *et seq*. (February, 2001) [discussing the importance of the private attorney general doctrine in the qui tam context]; Michael L. Rustad, *Smoke Signals From Private Attorneys General in Mega Social Policy Cases*, 51 DePaul L. Rev. 511 (Winter 2001) [analyzing the value of the private attorney general process in the tobacco litigation].) As Professor Rustad notes, "social policy torts empower ordinary Americans to address the

concerns of the community. . . . [¶] The whole point of social policy torts is to permit ordinary citizens to change corporate practices." (Rustad, *supra*, at 527.)

Other commentators have noted that this Court's jurisprudence has rigorously upheld legislative standing determinations similar to the UCL's, even against various "prudential barriers." (*See* Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 Geo. Mason L. Rev. 237, 243 (Winter, 1999).) In this case, the California Legislature has determined the standing required for bringing a UCL action:

> Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney . . . upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

(California Business & Professions Code § 17204.)

The California Legislature concluded that the imposition of an "injury-in-fact" requirement on the specific plaintiff was unnecessary in the context of a UCL action. Obviously, as discussed in the preceding section, that is because of the inherent injury done to the competitors and consumers and, as a result, to the public. This Court should uphold the California Legislature's determination that there is no need for personal injury-in-fact with the same rigor it affords to Congress's similar determinations.

Second, the thrust of the Solicitor General's brief appears to be that where a private attorney general is bringing the action, the "rules" will somehow change and that the change will necessarily deprive the defendant of the usual due process and other substantive and legal protections offered by the justice system. But the Solicitor General provides neither legal justification nor even anecdotal evidence to support that assertion.

Indeed, the proposition is ludicrous. Whether brought by a "private attorney general," i.e., an unharmed individual acting on behalf of the general public, or by a law enforcement or regulatory entity, such as the state Attorney General or the FTC (who – it should be noted – are similarly unharmed), the pleading standards, procedures and proof standards ***remain exactly the same***. The only thing that changes, in fact, is that the available remedies are ***more onerous*** where the action is brought by a law enforcement plaintiff. In addition to the same injunctive and restitutionary relief a private attorney general can obtain in a UCL action, a law enforcement entity can also obtain civil penalties in the amount of $2500 per violation. (California Business & Professions Code § 17206.)

The fundamental fallacy underlying the Solicitor General's brief is that standing, alone, invokes due process and constitutional protections. But that is not – and never was – the purpose of prudential standing requirements:

> In order to understand the concept of standing, its purpose must be discovered. The purpose of standing lies in the nature of the legal process and the function of our judiciary. In *Marbury v. Madison* Justice Marshall discussed the judicial

function in terms of the Court's authority to declare unconstitutional a statute enacted by Congress. Marshall's discussion serves as a fair description of the nature of judicial power in general, since any court's power to act arises from its constitutional grant of authority to decide cases and controversies between parties. Because courts are designed to settle specific disputes, they are not competent to deal with generalized grievances against society. Neither can courts give advisory opinions. Hence, the classic example: Even though Secretary of State Jefferson asked the United States Supreme Court to answer certain legal questions concerning the British blockade of French ports, Chief Justice Jay respectfully declined, since to do so was beyond the reach of judicial power.

The constitutional and judicial rejection of authority to deal with generalized grievances, as well as the rejection of authority to grant advisory opinions, arises from judicial recognition that a court's essential function is dispute settlement in accordance with legal principles, not law declaration. In the dispute-settlement process, legal principles are applied to a known, fixed set of facts, and the decision is thus limited to the application of that principle to that set of facts. Under this system, the parties come to the court with a specific claim of right (either statutory or customary) and argue that, under the peculiar facts of the case, their claim of right should be upheld. The court then chooses one of the claims of right and explains how under the facts of the particular

> case the appropriate claim of right was chosen. Without particular facts and without particular claims of right before the court, a decision of the court is not compelled by the judicial decisionmaking process.

Wallace M. Rudolph and Janet L. Rudolph, *Standing: A Legal Process Approach*, 36 Sw. L.J. 857, 858 (September, 1982).

As expressed in Rudolph, then, there are two basic reasons for requiring standing: (1) Courts should not deal with generalized grievances; and (2) Courts should not grant advisory opinions. The judicial process that demands standing thus requires: (1) A specific claim; (2) A fixed set of facts; and (3) Application of appropriate legal principles.

All of those parameters exist and those requirement are met in a UCL claim brought by a private attorney general acting on behalf of the general public – and specifically exist in the context of the action brought by Mr. Kasky against Nike:

- There is not a generalized grievance. There is, rather, an explicit and specific grievance, based on demonstrable violations. In this case, for example, Nike made false and misleading statements in a commercial context. What is notable here – and is a fact which is virtually ignored in the briefs of Nike, its amici and the Solicitor General – is that this case was decided at the pleading stage and the pleading was clear, explicit and specific: Nike made advertising statements to advance its own commercial interests and those statements

were false and misleading. That must be assumed to be true for the purposes of this decision. Thus, it is not a generalized grievance about amorphous statements are constitutionally protected. This case is raises a specific grievance in the context of expressly-stated facts.

- Similarly, no advisory opinion is sought. Rather, an actual adjudication of whether those specific statements were false and misleading is requested.

- Because those general purposes have been fulfilled, the specific requirements are similarly met:

    - There is a specific claim: Nike's statements about its business operations were made for a commercial purpose and they are false and misleading;

    - There are a fixed set of facts, predicated on the explicit pleading of the complaint about exactly what Nike did; and

    - There are specific legal principles which apply to determine the precise issue of whether Nike committed the alleged wrongs and what the consequences should be to Nike for having committed the alleged wrongs.

Thus, the prudential concerns which require standing are fulfilled in a UCL action, both generally-speaking and specifically in this case. That being true, there is no justification for the Solicitor General's unsupported foundational assertion that the First Amendment will be less stringently applied or that due process will be more lax where the representative plaintiff in the case is a private attorney general rather than a public prosecutor. In fact, that perspective impliedly, and wrongly, disparages the trial court judges and appellate justices who try and review these cases – as though they would be distracted and confounded by the presence of a private attorney general representative and would, therefore, impair or limit the defendant's rights, constitutional or otherwise. The Solicitor General's stand makes a mockery of the fundamental principle of our legal system that "Justice is Blind" and that the court does not take note of who or what either party is, but applies the laws to the facts without favoritism or bias.[2]

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2. In fact, if there is, indeed, any bias in the trial or appellate courts it is ***against*** private attorneys general, who have sometimes come to be perceived as the "bounty hunters" of the legal system during the last few years. (*See, e.g.*, Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 681, n.176 (February 2001).)

CONCLUSION

This Court should not become distracted from deciding the fundamental – and important – constitutional issues here about what constitutes commercial speech based on the specific allegations in this case to the effect that, in fact, Nike was trying to sell its product when it misrepresented the nature of its business operations to existing and potential customers. The issue of standing as raised by Nike and the United States is immaterial and irrelevant because, in fact, the representative plaintiff here properly has standing to challenge false and misleading commercial speech in order to protect California's businesses and citizens from the harm that inherently results from false and misleading advertising.

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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