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 EXXONMOBIL, MICROSOFT, MORGAN STANLEY, AND GLAXOSMITHKLINE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a corporation's speech on matters of public concern is entitled to the same level of First Amendment protection as speech on such matters by other speakers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI*[1]

ExxonMobil is the world's largest private integrated oil company, engaged in oil and gas exploration, production, supply, transportation, and marketing in some 200 countries around the world.

Microsoft is the worldwide leader in software, services, and Internet technologies for personal and business computing.

Morgan Stanley is one of the world's largest diversified financial services companies, providing investment banking, underwriting, sales and trading, investment advisory, asset management, and credit card services to individuals, corporations, governments, and other entities around the world.

GlaxoSmithKline is one of the world's largest pharmaceutical companies. It discovers, develops, and markets prescription drugs and consumer products in the United States and around the world.

Each of these *amici* has a strong interest in vindicating the First Amendment rights threatened by the judgment of the California Supreme Court, and in protecting the availability of relief in this Court in the circumstances presented here.

Each *amicus* does business in California and, accordingly, is potentially subject to civil and criminal liabilities

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[1] The parties have filed with the Clerk of this Court blanket consents to the filing of *amicus* briefs. Pursuant to Rule 37.6, *amici* state that no counsel for a party in this case authored this brief in whole or in part and that no person or entity other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief.

imposed under Cal. Bus. & Prof. Code § 17200 *et seq.* and § 17500 *et seq.* or similar laws that might be enacted in other states. Like virtually every other large corporate enterprise in the United States, *amici* regularly speak out on issues of public concern and in so doing place before the public facts about their products, services, or business operations and practices. Such issues range from human rights abroad; global climate change; environmental effects of business operations; healthcare reform, including such issues as access to prescription drugs, and healthcare crises such as the AIDS epidemic in Africa; and involvement with controversial foreign governments; to product safety; consumer issues, such as privacy and security; intellectual property rights; equitable treatment of customers; and diversity in the workplace. In some instances, *amici* are responding to criticisms; in others, they are initiating public discussion. Often, they are seeking to advance legislative or regulatory goals. In each such instance, their speech is an effort to engage public opinion on a vital issue of the day.

If a corporation's every press release, letter to an editor, customer mailing, op-ed article, and website posting may, under the California statutes at issue here, be the basis for civil and criminal actions, corporate speakers will find it difficult to address issues of public concern implicating their products, services, or business operations and practices—even to defend themselves in the court of public opinion when attacked.

SUMMARY OF ARGUMENT

1. Nike's speech and speech by corporations on other matters of public concern merit the highest level of First Amendment protection. Amid swirling controversy about globalization and the operations and practices of multinational corporations—an international controversy marked by burning editorials, consumer boycotts, violent demonstrations, and urgent demands for legislative action—Nike was

targeted by activists and portrayed in the news media as typifying multinational corporate misconduct in the Third World. Nike responded to these criticisms and portrayals through editorial advertisements, press releases, letters to the editor, op-ed articles in newspapers, and other established channels of public discussion and debate. The context, form, and content of Nike's speech demonstrate that the company was addressing matters of public concern, where the interests served by the First Amendment are at their zenith. Such speech by a corporation merits the highest level of First Amendment protection and is entitled to the same "breathing space" as speech on matters of public concern by other speakers.

Nike's speech cannot legitimately be classified as "commercial speech." Despite the indefiniteness of *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court has made clear that "commercial speech" is not merely speech that has an economic motivation, but "speech that proposes a commercial transaction." That category of speech is both defined and limited by the governmental interest that justifies special leeway in its regulation: protection of consumers from "commercial harms" incident to a commercial transaction. Such "commercial harms" may arise from false or misleading claims about a product (or the terms and conditions on which it is available) made by a seller in an advertisement for the product, or in the product's labeling; or they may arise from particularly oppressive forms of solicitation. These "commercial harms" are rightly deemed to be sufficiently severe and unavoidable, and the countervailing interests so slight, as to justify a degree of regulation that cannot be tolerated in the realm of political or social debate. A corporation's speech on matters of public concern, including statements about a product's qualities or characteristics or the impacts of a company's operations or practices, presented in established channels of public discussion and debate and not as part of a selling

message in product advertising or product labeling, does not threaten such "commercial harms." The category of "commercial harms" cannot itself be expanded to reach the effects of corporate speech on matters of public concern, presented in such channels of communication, lest speech that lies at the heart of the First Amendment be curtailed.

2. Under *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989), a party in Nike's position has standing to invoke the authority of this Court. The California Supreme Court has construed California law in a manner that exposes Nike and other corporate speakers to potential civil and criminal liability for engaging in core First Amendment speech. As a result, Nike must now defend its past speech in a lawsuit that the First Amendment forbids, and its future speech (and that of other corporate speakers) is gravely chilled. Each of these effects causes Nike "direct, specific, and concrete injury," *id.* at 623-24, thus entitling Nike to invoke the authority of this Court under Article III. For a party in Nike's position, sued in state court by a plaintiff lacking Article III standing, under a state statute that the state's highest court has sustained against the party's federal constitutional challenge, the only federal remedy is in this Court.

ARGUMENT

I. A CORPORATION'S SPEECH ON MATTERS OF PUBLIC CONCERN MERITS THE HIGHEST LEVEL OF FIRST AMENDMENT PROTECTION.

The question presented in this case is whether a corporation's speech on matters of public concern is entitled to the same level of First Amendment protection as speech on such matters by other speakers. *Amici* submit that the answer to this question must be "yes."

It is axiomatic that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to special protection. *NAACP* v. *Claiborne*

Hardware Co., 458 U.S. 886, 913 (1982) (quoting *Carey* v. *Brown*, 447 U.S. 455, 467 (1980)). Such speech lies "at the heart of the First Amendment's protection," *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 776 (1978), because "free and open debate" on matters of public concern is "vital to informed decision-making by the electorate," *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 571-72 (1968), and is "the essence of self-government," *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964). See also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (debate on matters of public concern must be "uninhibited, robust, and wide-open").

To provide "breathing space," *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 778 (1986) (quoting *New York Times*, 376 U.S. at 272 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963))), for true speech on matters of public concern, "the Court has affirmed that '[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters,'" *Philadelphia Newspapers*, 475 U.S. at 778 (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)). The First Amendment does not tolerate strict liability for false speech on matters of public concern and places heavy burdens on those who would hold a speaker liable for erroneous statements in addressing such matters.

As discussed below, Nike's speech plainly addressed matters of public concern, and a corporation's speech on such matters is entitled to the same "breathing space" as the speech of others.

A. Nike's Speech Plainly Addressed Matters of Public Concern.

"Whether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . ." *Connick* v. *Myers*, 461 U.S. 138, 147-48

(1983). An examination of each of these factors shows that Nike's speech in defense of its labor practices was plainly speech on a matter of public concern.

Context. The communications to which the company was responding provide the "context" of Nike's speech. Those communications demonstrate that, at least in the eyes of some, the labor practices of multinational corporations in developing countries, and Nike's labor practices in Asia in particular, have become "one of the major public issues of our time." *New York Times*, 376 U.S. at 271. Indeed, for a number of activists, Nike's labor practices in Asia provide a case study of human-rights abuses by multinational companies with international diplomatic ramifications. Thus, for example, the Hong Kong Christian Industrial Committee stated in a report criticizing the labor practices of Nike and other shoe companies in China:

> As leading international corporations, multinational sports shoe companies should play a positive role in improving human rights in China. They should become an example for others to follow.
>
> This is what President Bill Clinton promised when he de-linked the granting of Most Favoured Nation status from human rights in China. Mr. Clinton insisted that US capital can have a positive effect on the development of human rights in China, but we have yet to see these positive results.

Petitioner's Lodging 96, 117 (First Amended Complaint, Exh. C, *Working Conditions in the Sports Shoe Industry in China*). Another rights group characterized its report criticizing Nike's operations in Indonesia as "a case study of the industry as a whole." *Id.* at 242 (Exh. X, Community Aid Abroad, Briefing Paper, *Sweating for Nike: Labour Conditions in the Sports Shoe Industry*). See also *id.* at 127 (Exh. E, Vietnam Labor Watch report); *id.* at 232 (Exh. W, Boycott Nike, *Fact Sheet*).

The news media have also treated the issue as one of public concern. A CBS "48 Hours" broadcast featured Nike's operations in Vietnam as exemplifying attempts by multinational corporations to exploit "cheap labor" overseas. "The signs are everywhere," the correspondent intoned, "of an American invasion in search of cheap labor. Millions of people who are literate, disciplined and desperate for jobs." *Id.* at 131 (Exh. F). Nike's labor practices have also been the subject of a front-page story in *The New York Times*, see *id.* at 144 (Exh. H, Steven Greenhouse, *Nike Shoe Plant in Vietnam Is Called Unsafe for Workers*), and the subject of a columnist's crusade, see *id.* at 146 (Bob Herbert, *Nike's Boot Camps*); *id.* at 147 (Bob Herbert, *Brutality in Vietnam*); *id.* at 148 (Bob Herbert, *Trampled Dreams*); *id.* at 149 (Bob Herbert, *Nike's Bad Neighborhood*); *id.* at 150 (Bob Herbert, *Nike's Pyramid Scheme*), and were cited in another *Times* story as a case study of exploitation, see *id.* at 151 (Edward A. Gargan, *An Indonesian Asset Is Also a Liability*).

Content and Form. Nike's own speech, responding to its critics and various news media stories, addressed the same public issue; and the channels through which the company responded were the established channels of discussion and debate on matters of public concern. The company responded to questions from the news media, sent letters to the editor and other interested parties, and issued press releases and corporate policy statements. See, *e.g.*, *id.* at 121 (Exh. D, letter to YWCA official); *id.* at 138-39 (Exh. F, answers to questions by CBS reporter); *id.* at 183 (Exh. P, media statement); *id.* at 187 (Exh. Q, letter to critic); *id.* at 190 (Exh. R, letter to athletic directors); *id.* at 193 (Exh. S, letter to editor); *id.* at 198 (Exh. U, explanation of Nike Code of Conduct); *id.* at 201 (Exh. V, Nike Production Primer); *id.* at 265 (Exh. Y, remarks by CEO at shareholders' meeting); *id.* at 270 (Exh. Z, press release, *Nike Responds to Sweatshop Allegations*); *id.* at 285

(Exh. DD, letter to editor responding to critical op-ed article by paper's columnist); *id.* at 307 (Exh. FF, advertisement announcing Young report's conclusion); *id.* at 322 (Exh. II, press release, *Nike Addresses Concerns Regarding Women's Issues and Highlights Leadership in Worker Initiatives*). Cf. *New York Times*, 376 U.S. at 266 ("The publication here was not a 'commercial' in the sense in which the word was used in *Chrestensen*.").

In short, judged by its context, content, and form, Nike's speech addressed matters of public concern.

B. A Corporation's Speech on Matters of Public Concern Requires the Same "Breathing Space" as Speech by Other Speakers.

A corporation's speech on matters of public concern requires "breathing space" for the same reason that such speech by other speakers requires "breathing space," and because any other rule would violate the principles of speaker equality and viewpoint neutrality.

1. The Court has recognized that "the erroneous statement of fact is not worthy of constitutional protection" but "is nevertheless inevitable in free debate," and that "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz*, 418 U.S. at 340. Thus, to provide the necessary "breathing space" for speech on matters of public concern, "the Court has been willing to insulate even demonstrably false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation," *Philadelphia Newspapers*, 475 U.S. at 778.

This recognition that the First Amendment requires "breathing space" in discussion of public issues is not a special rule created for libel and defamation actions. The safeguards established by the Court in such actions simply apply the more general principle that "the government

cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." *Id.* at 777 (citing *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980); *First Nat'l Bank*, 435 U.S. at 786; *Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41, 47-54 (1986)). As the Court has stated:

> [T]he need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. . . . Because such a "chilling" effect would be antithetical to the First Amendment's protection of speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could "only result in a deterrence of speech which the Constitution makes free."

Philadelphia Newspapers, 475 U.S. at 777 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)).

The "breathing space" afforded speech on matters of public concern is required for speech by corporate speakers no less than for other speakers, even when the speech concerns their own practices, operations, and products. Like any other speaker, a corporation may be expected to make only those statements of fact that it believes to be true. But whether a particular statement of fact is "true" is often a matter of legitimate dispute. Often there are two sides to a story: a corporation's critics may credit one account, the corporation may credit another. Whether a statement of fact is considered to be "true" may also depend on a host of

other factors—for example, the subsidiary facts that one considers to be relevant; how one defines one's terms; what point or frame of reference one uses; whether a statement can be "true" if it is generally true even though counterexamples may exist, or is true as far as it goes even though it does not include facts that someone considers relevant. Moreover, whether a statement is really a statement of fact or instead a statement of opinion, or possibly a figure of speech, may be an issue. Each of the factual "misrepresentations" that Respondent attributes to Nike fall into one or more of these categories.[2]

The point is not that the "truth" of factual statements on matters of public concern is always unknowable. The point is that agreement on whether a statement is "true" is not

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[2] The first and second causes of action asserted by Respondent attribute seven "misrepresentations" to Nike. (See First Amended Complaint ¶¶ 75, 79.) These specified "misrepresentations" are not actually statements alleged to have been made by Nike but Respondent's characterization of Nike's positions on various issues. Four of the seven do not involve statements of fact: two state legal conclusions—that Nike's products are made in accordance with applicable laws and regulations (*id.* ¶¶ 75(b), (c); 79(b), (c)), and two state opinions—that a particular report "proves that NIKE is doing a good job and operating morally" (*id.* ¶¶ 75(f); 79(f)) and that "NIKE guarantees a 'living wage' for all workers who make NIKE products" (*id.* ¶¶ 75(g), 79(g)). The other three are broad statements that raise one or more of the issues described in text above. Moreover, to decide whether Respondent's allegations with respect to Nike's operations and practices were true—the predicate for deciding whether Nike's responses were themselves false—a court would have to determine myriad factual issues concerning events that allegedly occurred half-way around the world. It is difficult to imagine how any court could manage the issues of proof involved in placing a company's worldwide operations and practices on trial.

inevitable and often entails a series of choices made in good faith by speakers as well as listeners. The First Amendment itself affords speakers persuasive license in expressing what they regard to be the truth, see *New York Times*, 376 U.S. at 271-73—license that critics of corporate operations and practices are not characteristically shy about using. Even assuming that a corporate speaker like Nike could fairly be presumed to know everything that has ever happened at each of the 736 facilities located in the 51 countries in which 500,000 workers are used by its subcontractors to manufacture its products (Pet. 2), the notion that the company would be able to make factual statements that *someone* could not assert to be false or misleading in an action under Cal. Bus. & Prof. Code § 17200 *et seq.* and § 17500 *et seq.*, based on the considerations identified above, is fanciful.

It is therefore no answer to say, as the California Supreme Court said, that the "profit motive" (Pet. 12a), or greater "access to the truth" (*id.*), will prevent corporate speech on matters of public concern from being "chilled" if corporations are denied the "breathing space" afforded other speakers when addressing matters of public concern. As the Court stated in *New York Times*, 376 U.S. at 279:

> Even courts accepting [the defense of truth] as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser*, 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It

is inconsistent with the First and Fourteenth Amendments.

If a corporate speaker must limit its factual statements on matters of public concern to statements that no one could possibly challenge, or that the speaker could be certain it could prove as "true" in a court of law or before a regulatory body, the result will be "a deterrence of speech which the Constitution makes free." *Speiser*, 357 U.S. at 526. See also *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 50, 52-53 (1971) (plurality opinion); cf. *First National Bank*, 435 U.S. at 785 n.21 (noting chilling effect of statute prohibiting corporate speech on ballot measures except on subjects "materially affecting" a corporation's business or property).

2. Denying corporate speech on matters of public concern the same "breathing space" as speech by other speakers would violate the principles of speaker equality and viewpoint neutrality.

In *First National Bank*, 435 U.S. 765, the Court rejected the proposition that the value of speech can be made to depend on the identity of the speaker: "The inherent worth of . . . 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; see also *id.* at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."); *Pacific Gas & Elec.* v. *Pub. Util. Comm'n*, 475 U.S. 1, 8 (1986) ("critical considerations" are not the speaker's identity but "that the State [seeks] to abridge speech that the First Amendment protects, and that such prohibitions limit[ ] the range of information to which the public is exposed").

The Court in *First National Bank* thereby applied in the context of corporate speech one of the most fundamental principles of First Amendment jurisprudence, the principle of speaker neutrality. Simply stated, "government regulation may not favor one speaker over another." *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). See also *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 193-94 (1999); *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Consol. Edison*, 447 U.S. at 533-34; *Carey*, 447 U.S. at 459-63; *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression."); *Wieman* v. *Updegraf*, 344 U.S. 183, 193 (1952) (Black, J., concurring) ("We must have freedom of speech for all or we will in the long run have it for none but the cringing and craven.").

A rule denying corporate speech on matters of public concern "breathing space" would violate this principle of speaker neutrality, and "[t]he effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times*, 376 U.S. at 266 (quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)).

The Court has also stated that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Indeed, "[t]he principle of viewpoint neutrality . . . underlies the First Amendment." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984). "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828 (citing

Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622, 641-43 (1994)).

> In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse; it removes "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity."

Denver Area Telecom. Consortium, Inc. v. *FCC*, 518 U.S. 727, 782-83 (1996) (Kennedy and Ginsburg, JJ., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Cohen* v. *California*, 403 U.S. 15, 24 (1971)). See also *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Leathers* v. *Medlock*, 499 U.S. 439 (1991); *Pacific Gas*, 475 U.S. at 11-12; *Consol. Edison*, 447 U.S. at 537.

The prohibition against viewpoint discrimination precludes a rule under which a corporate speaker's critics, but not the corporate speaker, is afforded "breathing space" in speech addressing matters of public concern. For the rule "license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992). When the government thus limits the means by which a corporation may "participate in the public debate on . . . controversial issues of national interest and importance," it favors speech of the corporation's critics and thereby "strikes at the heart of the freedom to speak." *Consol. Edison*, 447 U.S. at 535.

C. The Governmental Interest that Justifies Commercial Speech Regulation Does Not Justify Such Regulation of Corporate Speech on Matters of Public Concern.

A corporation's speech cannot both address matters of public concern and yet be regulable as "commercial speech." If the speech addresses matters of public concern, it is entitled to the highest level of First Amendment protection and must be afforded "breathing space." But if the speech is regulable as "commercial speech," the government may intervene on an adequate record to ensure its truthfulness, apply a "strict liability" regime, and impose other forms of regulation—including prescreening and affirmative disclosure requirements, see *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.12 (1976)—that are not tolerated in the realm of fully protected speech. Speech on matters of public concern cannot be made subject to such a regime because such speech does not threaten the type of "commercial harms" that justify that regime in the realm of commercial speech.

Notwithstanding the indefiniteness of *Bolger*, the Court has made clear that "commercial speech" is not merely economically motivated speech, but "speech proposing a commercial transaction."[3] Although "speech proposing a

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[3] The Court has stated that commercial speech is speech that informs consumers about "who is producing and selling what product, for what reason, and at what price," *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 496 (1996) (opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) (quoting *Va. State Bd. of Pharm.*, 425 U.S. at 765), "a communication that does no more than propose a commercial transaction," *Thompson* v. *W. States Med. Ctr.*, 122 S. Ct. 1497, 1503 (2002) (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993)); *see also Lorillard Tobacco*

(continued)

commercial transaction" receives "lesser protection than other constitutionally guaranteed expression," *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 422 (1993), this is not because such speech is less important or less valuable than other protected expression. On the contrary, as the Court has recognized, a consumer's interest in the free flow of commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate," *Thompson* v. *W. States Med. Ctr.*, 122 S. Ct. 1497, 1503 (2002) (quoting *Va. State Bd. of Pharm.*, 425 U.S. at 763), and the free flow of commercial information is "indispensable to the proper allocation of resources in a free enterprise system [and] ... to the formation of intelligent opinions as to how that system ought to be regulated or altered," *Va. State Bd. of Pharm.*, 425 U.S. at 765. See also *Florida Bar* v. *Went For It, Inc.*,

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Co. v. *Reilly*, 533 U.S. 525, 554 (2001) (Commercial speech is "speech proposing a commercial transaction.") (quoting *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557 (1980)); *United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001) ("[C]ommercial speech [is] usually defined as speech that does no more than propose a commercial transaction."); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) ("[P]roposal of a commercial transaction [is] '*the test*' for identifying commercial speech.") (quoting *Bd. of Trustees* v. *Fox*, 492 U.S. 469, 473-74 (1989)). This is the type of expression—"I will sell you the X prescription drug at the Y price"—for which the commercial speech doctrine was devised. *Va. State Bd. of Pharm.*, 425 U.S. at 761; *see also Bates* v. *State Bar*, 433 U.S. 350, 364 (1977) (Commercial speech "inform[s] the public of the availability, nature, and prices of products and services."); *44 Liquormart*, 517 U.S. at 496 (opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) ("[A]dvertising provides consumers with accurate information about the availability of goods and services.").

515 U.S. 618, 636 (1995) (Kennedy, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting) ("The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures."). Even if the Court had not recognized the importance and value of commercial speech, the government could not treat such speech as less worthy than other protected expression, for "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *W. States*, 122 S. Ct. at 1503 (quoting *Edenfield* v. *Fane*, 501 U.S. 761, 767 (1993)).[4]

What justifies greater regulation of commercial speech than of other protected expression is not the lesser value of this speech but the government's interest in preventing "commercial harms." See *Discovery Network*, 507 U.S. at 426. "It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" *44 Liquormart,*

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[4] The Court's statement that commercial speech occupies a "subordinate position in the scale of First Amendment values," e.g., *Went For It*, 515 U.S. at 623 (citation omitted), is difficult to reconcile with the Court's other statements affirming the importance and value of such speech and the rule against governmental determinations regarding the worth of speech, see *Lorillard*, 533 U.S. at 575 (Thomas, J. concurring in part and concurring in judgment) (reiterating view that "there is no 'philosophical or historical basis for asserting that "commercial" speech is of "lower value" than "noncommercial" speech'") (citation omitted); *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in judgment) (observing that Court's references to the "subordinate position" of commercial speech have been "without clear rationale").

Inc. v. *Rhode Island*, 517 U.S. 484, 502 (1996) (opinion of Stevens, J.) (quoting *Discovery Network*, 507 U.S. at 426).[5]

Such "commercial harms" are threatened when a seller makes false or misleading claims about a product or service, or the terms on which it is offered for sale, in a communication proposing a sale. The resulting injury can be severe and unavoidable: "Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised." *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring in judgment). In discussing these harms, Justice Stevens has noted the "immediate harmful impact" that a false product claim can cause when made at point of sale, where consumers "may respond to the falsehood before there is time for more speech and considered reflection to minimize the risks of being misled." *Id.* See *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 457 n.13 (1978) ("The immediacy of a particular communication and the imminence of harm are factors that have made certain communications less protected than others."). It is the government's interest in preventing false or misleading claims threatening such injuries, in communications proposing a sale, that justifies special leeway in the regulation of commercial speech.[6]

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[5] See also *Lorillard*, 533 U.S. at 576 (Thomas, J. concurring in part and concurring in judgment) (government's leeway in regulating commercial speech "is limited to the peculiarly *commercial* harms that commercial speech can threaten—*i.e.*, the risk of deceptive or misleading advertising"); *Bolger*, 463 U.S. at 81 (Stevens, J., concurring in judgment) ("The interest in protecting consumers from commercial harm justifies a requirement that advertising be truthful . . . .").

[6] The Court has also held that particularly oppressive modes of solicitation can be a source of "commercial harm." See *Ohralik*,

(continued)

Only when a corporation's statements are presented as a part of a corporation's selling message in a product advertisement or on a product label can the government's interest in preventing "commercial harms" arguably justify a degree of regulation not permitted for speech by other speakers. By contrast, when presented in established channels of public discussion and debate, such as those used by Nike here, a corporate speaker's statements on matters of public concern—including statements concerning the qualities or characteristics of a product, or the impacts of the company's business operations or practices—should receive the same level of First Amendment protection as statements concerning such matters by other speakers. Society's interest in "uninhibited, robust, and wide-open" debate on matters of public concern, *New York Times*, 376 U.S. at 270, and the principles of viewpoint neutrality and speaker equality, require no less. See *supra* pp. 12-14.[7]

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436 U.S. at 447 (in-person solicitation); *Went For It*, 515 U.S. 618 (targeted direct-mail solicitation); see also *Shapero* v. *Ky. Bar Ass'n*, 486 U.S. 466, 474-77 (1988); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 641-42 (1985). In several cases, the Court has appeared to accept the legitimacy of regulating commercial speech for purposes other than preventing such "commercial harms" (*i.e.*, those threatened by false or misleading advertising or particularly oppressive modes of solicitation). But in only one case since *Virginia Board* has the Court upheld a commercial speech restriction that was not justified to prevent such harms. The Court upheld such a restriction in *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328 (1986), on the basis of a paternalistic rationale that it has since repudiated. See *W. States*, 122 S. Ct. at 1507-08; *44 Liquormart*, 517 U.S. at 510 (opinion of Stevens, J.); *id.* at 518 (Thomas, J., concurring in judgment).

[7] To the extent that a "selling message" is deemed to be implicit in whatever a corporation may say on matters of public concern,

(continued)

As discussed, Nike's speech was core First Amendment speech addressing matters of public concern. The only "harm" that the company's claims could be said to threaten if those claims were determined to be "false" (but see *supra* pp. 9-11) would be that some consumers might have been led to view the company more favorably than they might otherwise have viewed it and, as a result, might have decided to purchase the company's products when they otherwise might not have done so.[8] This "harm" will result, moreover, only if these consumers are not dissuaded by further speech by the company's critics. The opportunity for response available to a corporation's critics when the corporation speaks through established channels of public discussion and debate disables the government from placing special restrictions on the corporation's speech. In such a circumstance, the admonition that "the fitting remedy for evil counsels is good ones" (*Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)) applies. See *Ohralik*, 436 U.S. at 457. "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the [First Amendment]." *Abrams* v. *United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J. dissenting).

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even in established channels of policy and political discussion and debate, that commercial aspect is "inextricably intertwined" with the corporation's "fully protected speech" and thus the entirety of the speech must be classified as noncommercial. *Riley* v. *Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 796 (1988).

[8] Cf. *Lorillard*, 533 U.S. at 580 (Thomas, J., concurring in part and concurring in judgment) (rejecting argument "that an indirect solicitation is enough to empower the State to regulate speech") (citing *Gitlow* v. *New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement . . . .")).

In sum, any "harm" from a company's speech on matters of public concern is not so severe or unavoidable, or the countervailing First Amendment interest in providing "breathing space" so slight, as to justify subjecting such speech to the regime of regulation applicable to commercial speech.[9] Applying the commercial speech regime to a corporation's statements on matters of public concern would drastically curtail valuable speech on vital issues of the day. "Society as a whole then would be the loser." *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984).

II. UNDER *ASARCO*, A PARTY IN NIKE'S POSITION HAS STANDING TO INVOKE THE AUTHORITY OF THIS COURT.

A. Nike Satisfies the Article III Requirements for Standing.

A party has standing to invoke the authority of a federal court under Article III if the party can show injury-in-fact, causation, and redressability. *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). A party in Nike's position satisfies these requirements.

This Court has long recognized its Article III jurisdiction in the circumstances presented here:

> When a state supreme court denies the existence of a federal right and rests its decision on that basis, this Court unquestionably has jurisdiction to review the federal issue decided by the state court. To suggest

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[9] That such "harm" is insufficient to justify special regulatory leeway is confirmed by the fact that the commercial speech regime is not, and would never be, applied to those whose "false" statements of fact on matters of public concern *discourage* consumers from purchasing a company's products, even though the "harm" would be the same.

> otherwise would contradict principles laid down in the Judiciary Act of 1789 . . . and settled since *Martin* v. *Hunter's Lessee*[.]

Quinn v. *Millsap*, 491 U.S. 95, 104 (1989); see also, *e.g.*, *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 262 (1933) (finding Article III jurisdiction where, as here, "valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a specific and substantial degree by the [federal court's] decision of the question of law," and "[t]he relief sought is a definitive adjudication of the disputed constitutional right of the appellant, in the circumstances alleged, to be free from the [state law]").

A corporation like Nike has an interest, protected by the First Amendment, in speaking on matters of public concern. See, *e.g.*, *Consol. Edison*, 447 U.S. at 530 (advocacy of nuclear power); *First Nat'l Bank*, 435 U.S. at 765 (opposition to tax initiative); *Thomas* v. *Collins*, 323 U.S. 516 (1945) (union solicitation); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940) (labor picketing); cf. *Pacific Gas*, 475 U.S. 1 (plurality opinion). That First Amendment interest is threatened by the two California statutes construed by the California Supreme Court in this case, under which Nike may now be subject to civil and criminal liability for engaging in such speech.[10]

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[10] The California Supreme Court's judgment operates as a definitive construction of state law, which "fixes the meaning of the statute," *Winters* v. *New York*, 333 U.S. 507, 514 (1948), and puts "words in the statute as definitively as if it had been so amended by the legislature," *Wainwright* v. *Stone*, 414 U.S. 21, 23 (1973) (per curiam) (quoting *Winters*, 333 U.S. at 514). Its judgment constitutes "the words of the statute." *Button*, 371 U.S. at 432.

The California statutes cause Nike injury-in-fact by forcing the company to defend its past speech in an ongoing lawsuit that the First Amendment forbids, and by chilling the company's future speech through the threat of more such forbidden lawsuits. The threat of liability for engaging in protected speech constitutes both actual and threatened injury sufficiently distinct and palpable to support federal court standing. A decision by this Court invalidating the California statutes as so construed would redress this injury.

This Court has "avoided making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965). "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Id.* Moreover, the Court has repeatedly recognized that the *threat* of litigation constitutes a cognizable injury in the First Amendment context:

> It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance.

Rosenbloom, 403 U.S. at 52-53 (plurality opinion) (quoting *Speiser*, 357 U.S. at 526 (1958)); see also, *e.g.*, *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972) ("[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."); *Smith* v. *California*, 361 U.S. 147, 150-52 (1959) (recognizing chilling effect of strict-liability rules on speech). The very existence of a statute that "does not aim specifically at evils within the allowable area of State

control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech. . . . results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill*, 310 U.S. at 97-98; see also *id.* at 97 ("It is not merely the sporadic abuse of power . . . but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.").

The chilling effect of the California court's decision exists now and "each passing day may constitute a separate and cognizable infringement of the First Amendment," *Nebraska Press Assoc.* v. *Stuart*, 423 U.S. 1327, 1329 (1975) (opinion of Blackmun, J.) (in chambers), sufficient to give rise to an injury in fact. See also *Nebraska Press Assoc.* v. *Stuart*, 423 U.S. 1319, 1325 (1975) (opinion of Blackmun, J.) (in chambers) (delaying review "would constitute and aggravate a deprival of . . . [First Amendment] rights, if any, that the [petitioners] possess and may properly assert"). As the Court has recognized:

> [where] uncertainty of the constitutional validity of [a state statute] restricts the present exercise of First Amendment rights. . . . it would be intolerable to leave unanswered . . . an important question . . . under the First Amendment; an uneasy and unsettled constitutional posture of [the challenged state statute] could only further harm the operation of a free press.

Miami Herald Publ'g Co. v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974).

B. *ASARCO* Confirms the Standing of a Party in Nike's Position.

Under *ASARCO*, 490 U.S. 605, a party in Nike's position has standing to invoke the authority of this Court. Like the petitioners in *ASARCO*, Nike seeks invalidation of a state

supreme court's decision on a federal question, in a case in which petitioners were the original defendants, and in which the state courts took no account of Article III standing rules as applied to the respondent. Like the judgment of the Arizona Supreme Court in *ASARCO*, the judgment of the California Supreme Court here "causes concrete injury to the parties who seek now for the first time to invoke the authority of the federal courts in the case." *Id.* at 612. See Robert L. Stern et al., *Supreme Court Practice* § 18.1, at 814 (8th ed. 2002) ("[A] party who seeks entry into the federal court system for the first time must be able to satisfy the Article III standing requirements *at that point.*") (citing *ASARCO*) (emphasis added); Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 155-56 (4th ed. 1996) (same).

In *ASARCO*, plaintiffs (individual taxpayers and an educational association) obtained a declaration from a state supreme court that a state law governing mineral leases was void under federal law. 490 U.S. at 610. The state court "took no account" of the plaintiffs' "federal standing." *Id.* at 617. This Court concluded, however, that the petitioners—defendants in the state court action—had standing to challenge the state supreme court's judgment in this Court, because they alleged a "specific injury stemming from the state-court decree, a decree which rests on principles of federal law." *Id.* Noting that "it is petitioners, the defendants in the case and the losing parties below, who bring the case here and thus seek entry to the federal courts for the first time in the lawsuit," the Court held that "petitioners have standing . . . and that this dispute now presents a justiciable case or controversy." *Id.* at 618.

The petitioners in *ASARCO* contended that (1) "the [state] Supreme Court's decision rest[ed] on an erroneous interpretation of federal" law, (2) the judgment "secured by respondents, along with the relief that may flow from that

ruling, [was] invalid under federal law," and (3) if this Court were to agree with petitioners, "reversal of the decision below would remove its disabling effects upon them." *Id.* at 618-19. The Court in *ASARCO* cited these circumstances as sufficient to "meet each prong of the constitutional standing requirements." *Id.* at 619. The same circumstances are present here. In light of the direct and immediate injury to Nike caused by the California court's judgment, particularly its chilling effect on core First Amendment speech, the Court will be deciding the questions presented not "in the rarified atmosphere of a debating society," *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982), but in the crucible of an Article III case or controversy.

A federal court unquestionably would have had Article III jurisdiction to entertain a declaratory judgment action seeking invalidation of the California statutes, if the statutes had been enacted as the California Supreme Court has construed them. See 28 U.S.C. § 2201; 42 U.S.C. § 1983; see, *e.g.*, *Steffel* v. *Thompson*, 415 U.S. 452, 458-59, 475 (1974) (threat of enforcement sufficient under Article III to permit petitioner's challenge to state law allegedly conflicting with First Amendment); *Wooley* v. *Maynard*, 430 U.S. 705, 709-10 (1977) (where threat of enforcement exists, petitioner may seek federal court declaration that state statute violates First Amendment rights). But for the *Rooker-Feldman* doctrine, a party in Nike's position could challenge the California statutes in a federal declaratory judgment action even now. See *ASARCO*, 490 U.S. at 622-23 (doctrine bars direct review in lower federal courts of a decision reached by the highest state court). The fact that a federal district court would have jurisdiction to hear such a challenge confirms that Nike may assert its First Amendment challenge here. But because the *Rooker-Feldman* doctrine would bar Nike from bringing such an action, and

because the California court's judgment causes Nike present injury, Nike's *only* federal remedy is in this Court.

CONCLUSION

The judgment of the California Supreme Court should be reversed.

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