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 FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief will address the following question:

Whether speech by a manufacturer or producer that responds to an attack on its product or participates in debate on a matter of public concern may nevertheless be classified as commercial speech, and deprived of full First Amendment protection, because it is economically motivated or because it concerns the utility or safety of the speaker's product.

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BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

It is not uncommon for members of the NAM to find that the utility, safety, or healthfulness of products they manufacture has come under public attack. In such instances, they often desire to defend their products by bringing to the public's attention information that will illuminate the public debate and counter what the manufacturer believes to be unwarranted or unsubstantiated accusations. However, the threat of sanctions for speech later found – not necessarily reliably – to have been inaccurate is bound to chill the manufacturer's participation in the public debate, leaving that debate unfairly and misleadingly one-sided. It is important that this Court guard against such undesirable effects by recognizing that a manufacturer's defense of the utility, safety, or healthfulness of its products, when that has become a topic of public concern, is to be accorded full First Amendment protection.[1]

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[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the amicus, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. The parties have lodged letters with the Clerk expressing their blanket consent to the filing of amicus briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, Nike's foreign manufacturing practices were challenged, and the company responded by issuing various statements explaining and defending its practices. In many other instances, the utility or safety of a manufacturer's product is attacked by consumer groups, investigative reporters, or others, and the company would wish to respond and place before the public its side of the controversy. The thesis of this brief is that, when a manufacturer is responding to a public attack on its product or the product is otherwise the focus of public debate or controversy, the manufacturer's statements are due the same full First Amendment protection as those of its critics. The reduced protections afforded to commercial speech are insufficient to prevent substantial chilling of useful speech by manufacturers that would, if not inhibited, inform and enrich the public debate.

1. At the outset, the test adopted by the Supreme Court of California for distinguishing between fully protected speech and less protected commercial speech is unacceptable. It effectively discriminates against expression on matters of public importance for no reason other than that the speaker is acting from economic motivations. Such an approach contradicts this Court's established standard for determining whether expression is commercial or non-commercial. In no other context of First Amendment jurisprudence has a speaker's motivation, standing alone, reduced the level of constitutional protection given to expression. Because the lower court's approach conflicts directly with the standard adopted by this Court in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), for defining commercial speech, and because it is inconsistent with established First Amendment jurisprudence in regard to speaker motivation, it must be rejected.

2. At the same time, it is important that this Court not adopt as its basis for reversal the narrow and artificial ground

that Nike's speech did not directly concern either the quality or safety of its product. Much speech by a manufacturer or producer about its products constitutes an important contribution to debate about matters of public importance – every bit as much as did Nike's communications here. Such expression cannot be subjected to the type of regulation embodied in the California statute without unduly trenching on First Amendment values.

To provide only the reduced level of commercial speech protection to a company's defense of one of its products when that product is the focus of a public debate would (1) deprive the public of potentially valuable information and opinion about that issue by chilling corporate speakers, (2) unconstitutionally discriminate against one side of a public debate, and (3) effectively undermine this Court's conclusion that corporations possess "the full panoply of protections available to its direct comments on public issues." *Bolger*, 463 U.S. at 68.

Were all manufacturer or producer speech about product attributes automatically to be deemed commercial speech, the negative impact on the interests of free expression would be both direct and severe. Fear of sanctions would cause prudent manufacturers to engage in self-censorship or simply to refrain from any controversial expression, lest they unwittingly expose themselves to sanctions. In addition, it would constitute viewpoint discrimination of the worst sort. Under such a constitutional framework, Ralph Nader would receive full First Amendment protection when attacking the safety of General Motors' automobiles, yet General Motors' response would receive only commercial speech protection. Similarly, those who denounce as sham the claim that Vitamin C reduces the risk of disease could speak with impunity, while orange growers' contributions to the debate could be strictly scrutinized for accuracy. These examples are merely illustrative of countless public debates that focus on the quality or safety of a product.

Any rule that creates such imbalance between the opposing sides of a public controversy is unacceptable. It would amount, in the words of this Court, to licensing "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). For these reasons, a manufacturer's commentary about the characteristics of its products is not classifiable as commercial speech simply by virtue of its subject matter. Rather, when the manufacturer is responding to a public attack on a product or the product is otherwise the focus of public debate or controversy, the manufacturer's statements are entitled to the same full First Amendment protection as those of the product's critics.

3. Recognition of this principle would not unacceptably undermine government efforts to control false and misleading speech. Most of what has traditionally been classified as commercial speech simply proposes a commercial transaction and does not constitute debate on any issue of general public importance. Such commercial solicitations can continue to be regulated in the manner and to the extent that the Court concludes is appropriate for speech classified as "commercial." While there will of course remain a borderland in which classification is difficult, appropriate tests can be developed that are responsive to the paramount need to promote robust, uninhibited debate on issues of public importance.

ARGUMENT

I. THE LEVEL OF CONSTITUTIONAL PROTECTION AFFORDED TO SPEECH ON PUBLIC ISSUES IS NOT REDUCED SIMPLY BECAUSE THE SPEECH IS ECONOMICALLY MOTIVATED.

A. The California Supreme Court's Test For Determining The Presence Of Commercial Speech Directly Conflicts With The Standard Announced By This Court In *Bolger*.

The California Supreme Court adopted a test for determining whether speech is commercial that refers to three factors: (1) the presence of "a commercial speaker"; (2) "an intended commercial audience"; and (3) "representations of fact of a commercial nature." Pet. App. 21a-22a. On closer examination, these three factors effectively resolve into a focus on a single factor: the speaker's economic motivation. When the speech in question is made by a commercial speaker to a commercial audience about commercial facts, it is reasonable to assume, as a categorical matter, that that speech will be motivated by the economic desire either to increase or to prevent a reduction in sales.

The California court's standard makes no reference to two of the three key factors identified by this Court in its test for determining whether regulated expression is properly classified as commercial speech: the use of the advertising form; and specific reference to a product. *Bolger*, 463 U.S. at 66-67. Instead, the lower court's test focuses exclusively on the extent to which the speech in question is motivated by the speaker's desire to increase sales – *i.e.*, the presence or absence of an economic motivation for the expression. This rationale is untenable, and was rejected by *Bolger* itself. See 463 U.S. at 67 ("the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech").

In no other First Amendment context has this Court reduced the level of constitutional protection given to speech solely on the basis of a speaker's motivation. See, *e.g.*, *Hustler Magazine* v. *Falwell*, 435 U.S. 46, 53 (1988) (constitutional protection of public discourse does not depend upon the motivation for the expression). Indeed, it is generally unquestioned that expression motivated exclusively by considerations of personal gain receives full First Amendment protection. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964) (fact that New York Times was paid for advertisement held to be irrelevant to level of First Amendment protection). For example, no one could reasonably argue that expression by social security recipients urging an increase in their benefits or speech by taxpayers (including corporate taxpayers) urging a tax cut is not fully protected speech. While the taxpayer's motivation is financial and the manufacturer's is commercial, for constitutional purposes that difference is inconsequential: in both situations, the speaker's motivation is personal financial gain. Thus, logic does not support, nor precedent compel, giving reduced constitutional protection to expression solely because the speaker seeks a commercial benefit.

B. Reducing Speech Protection Exclusively On The Basis Of Economic Motivation Would Cause Serious Harm To First Amendment Interests.

Reduction of the protection given to speech solely because of the presence of an economic motivation would result in serious harm to the values served by the constitutional protection of expression. A manufacturer or producer whose product has been criticized is often in a position to convey to the public valuable information relating to that criticism that may well be unavailable from other sources. If such expression is given only the reduced protection enjoyed by commercial speech, it would mean that it would lose First Amendment protection in the event of a subsequent finding that it was false. *Cent. Hudson Gas & Elec. Corp.* v. *Pub.*

Serv. Comm'n, 447 U.S. 557, 566 (1980). The result would be a chill on manufacturer speech because of the natural fear that, whatever the manufacturer's understanding at the time, a future fact-finder could conclude that the speech was inaccurate or misleading. Such chilling would deprive society of the benefit of a more fully informed public debate.

Avoidance of such a chill was this Court's fundamental goal in providing speech on matters of public importance the "breathing space" necessary to prevent "the pall of fear and timidity" that otherwise might affect speakers. *New York Times*, 376 U.S. at 272, 278. As *New York Times* makes clear, the minimization of such chilling effects is among the most important ends to be promoted by First Amendment protection.

The suggestion in the opinion below (Pet. App. 20a) that the profit-making incentive and the comparative ease of verification make economically motivated expression relatively immune to chill by the fear of possible future liability is inaccurate. Economically motivated expression is no less likely to be chilled than a wide range of other speech motivated by considerations of personal gain, most of which unquestioningly receives full First Amendment protection. For example, a political candidate – much like a profit-making corporation – naturally possesses an inherent incentive to speak, if only to facilitate his or her election. Yet the candidate's expression of course receives full First Amendment protection. The same could be said of other financially interested groups, such as labor or taxpayer organizations, both of whose expression is fully protected.

It is certainly true that a manufacturer has built-in incentives to promote its products in one way or another. But as an economic entity, a corporation is at the same time strongly motivated to reduce financial risks as much as possible. Indeed, many companies employ risk managers whose specific job is to keep the company from engaging in risky conduct.

Thus, while there can be little doubt that manufacturers wish to promote their products, that does not make them immune to concerns about future liability. Such concerns are bound to influence what the manufacturer chooses to say about its products. Constraining forces will be especially powerful where defense of a product requires the making of possibly controversial statements – statements that, if made, may ultimately be seen to have been both fully accurate and highly beneficial in helping the public to reach sound conclusions on important but controversial subjects.

This conclusion is nothing more than a sensible recognition that, despite significant incentives to speak, the risk of sanctions for inaccurate or misleading speech will necessarily give *any* speaker pause. The result will often be to silence even well intentioned and subjectively honest expression, because of uncertainties about how that expression will later be judged by a fact-finder in which no rational prospective speaker can have complete confidence. The price that this chilling effect exacts on the public debate is one our society is not, and should not be, willing to pay, whether or not the speaker's motive is economic gain. Indeed, in *New York Times* this Court extended First Amendment protection to the defendant for fear of chilling expression, even though the challenged expression appeared in the form of an advertisement for which the newspaper had been paid. 376 U.S. at 265. This Court thus recognized that a speaker may be chilled by the threat of regulation despite the presence of a profit incentive for the speech.

As for ease of verification, it is simply not true that the accuracy of statements made with economic motivations is categorically easier to verify than that of statements that are not economically motivated. Indeed, when scientific or pseudo-scientific issues are advanced to challenge the safety or efficacy of a product, that very fact suggests that both sides of the debate may have reason to be unsure that their contentions are unimpeachably correct. In such circum-

stances, the speaker may honestly believe that the statements it wishes to make are accurate, yet genuinely fear that others in the future could come to different conclusions.

Finally, to reduce the level of constitutional protection on the basis of economic motivation will often result in unacceptable viewpoint discrimination in the degree of constitutional protection afforded the different participants in the debate. This will be so whenever only those on one side of the debate possess economic motivation, as in the not-infrequent situation in which those challenging the commercially motivated speaker are self-described consumer advocate groups. See, *e.g.*, *R.A.V.*, 505 U.S. 377; *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

II. EXPRESSION BY A MANUFACTURER ON A MATTER OF PUBLIC CONTROVERSY SHOULD NOT RECEIVE DIMINISHED PROTECTION BECAUSE IT FOCUSES ON CHARACTERISTICS OF THE PRODUCT.

A. The Outcome Of This Case Should Not Turn On The Fact That Nike's Speech Did Not Directly Concern Characteristics Of Its Product.

In *Bolger,* this Court indicated that three factors were to be considered in deciding whether to classify speech as commercial: (1) the use of the advertising form; (2) a specific product reference; and (3) the presence of economic motivation. 463 U.S. at 66-67. While none of these factors, standing alone, was deemed sufficient to classify speech as commercial, "[t]he combination of *all* these characteristics * * * provides strong support for the * * * conclusion that the [expression is] properly characterized as commercial speech." *Id*. at 67 (footnote omitted) (emphasis in original). Though the specific question was not before this Court at the time, the Court should now make clear that this three-factor test is not applicable to product-related corporate expression

when characteristics of a product are the focus of a public debate and the corporate speech is part of that debate.

This principle carries particular force when the manufacturer is responding to public attacks upon the safety or efficacy of one of its products. In such circumstances, it is both unwise and unfair to saddle the manufacturer's defense with the prospect of strict liability for misstatements, rather than permitting the truth to emerge in the crucible of vigorous, uninhibited public debate. Indeed, this Court's simultaneous and explicit recognition in *Bolger* of a corporation's "full panoply of protections" (463 U.S. at 68) for its comments on public issues appears to make such a conclusion obvious. Still, this case provides an important opportunity to resolve any uncertainty inhering in *Bolger*'s discussion of the issue and to provide the necessary guidance to the lower courts, which must deal with these questions in the first instance.

As noted in the preceding section, the test adopted by the Supreme Court of California for identifying commercial speech is facially inconsistent with the standard promulgated by this Court in *Bolger*, as well as with this Court's more far-reaching First Amendment jurisprudence concerning the role of motivation in determining the level of constitutional protection for expression. While the ruling must therefore be reversed, it is important that the basis for reversal not be confined to the narrow and artificial ground that petitioner's speech did not concern the quality, performance or safety of one of its products. Such a narrowly based decision could carry with it the implication that when corporate speech does, in fact, concern a product, it will for that reason be classified as commercial speech, regardless of the context in which it is made. Such an outcome would be incompatible with First Amendment interests.

Products themselves often provide the focus of an important and current public debate. Some examples include: the effect of oat bran, dairy products or beef on heart health; the

extent to which the Vitamin C in citrus fruits cures colds; whether certain automobiles were subject to sudden unexplained acceleration; whether microwaves from cellular phones cause brain tumors; whether low-tar cigarettes are safer; and the health effects of fast food.

When, as in these and a host of other circumstances, characteristics of a product are at the center of a public debate, treatment of manufacturer or producer speech on the subject as inherently commercial, and therefore sanctionable if found to be inaccurate or potentially misleading, would undermine fundamental precepts of First Amendment doctrine and theory. Indeed, the effect would be little different from the California Supreme Court's equation of economically motivated expression with commercial speech. In short, the very same reasons for refusing to rely upon motivation to classify petitioner's expression as commercial speech apply with equal force to a corporation's speech about one of its products when that product is at the center of a public debate.

First, where the product's quality or safety is the subject of controversy, there is bound to be a serious chilling effect if producer speech about the product receives only the reduced protection afforded commercial speech, especially in today's world of huge tort verdicts for a vast range of alleged corporate misconduct. This inhibition of corporate defense of its products is bound to impoverish the public discourse, depriving society of valuable information and opinion on matters of public importance. Frequently, because of its special incentives and resources, the manufacturer or producer will possess knowledge about the qualities of its products that no other participant in the debate is in a position to provide.

It is true, of course, that a manufacturer or producer could not be deemed an objective observer about its products, but free speech is not limited to disinterested commentators. Indeed, in no other context has the level of First Amendment

protection depended on whether or not the speaker is self-interested. Any suggestion that the level of constitutional protection decreases in the presence of speaker self-interest would have a dramatic and disruptive impact on the modern system of free expression, where fully protected expression is often employed to promote narrow individual or group interests. See, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Moreover, the presence of speaker self-interest in no way inherently implies that the speech is untruthful or harmful.

Second, where a product is the focus of public debate, characterizing corporate expression about the product as commercial speech would give rise to the very same constitutional problem that attends characterization of all commercially motivated expression as commercial speech: an entirely impermissible viewpoint-based discrimination in the protection of expression.

Imagine a debate between a spokesperson for Alcoholics Anonymous and the head of a winery about the health benefits and detriments of alcoholic beverages, or between a representative of a Vietnam veterans' organization and an official of a chemical company that produced Agent Orange about the health effects of that defoliant. Is it conceivable that First Amendment doctrine should, in such instances, wrap the attacker's criticisms of the product in the full protections of the First Amendment, while forcing the product's defender to speak at the peril of potentially severe sanctions for statements subsequently found (not necessarily reliably) to be inaccurate or misleading? Such a double standard of constitutional protection would necessarily give a significant advantage to one side of a public debate, a constitutionally impermissible result.

Finally, characterizing all corporate speech about a product as commercial speech, even when the product is the focus of a public debate, would contravene this Court's established holding that corporations possess full First Amendment

rights to comment on public issues. In *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784 (1978), the Court found "no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation * * *." Moreover, the *Bellotti* Court found impermissible a "legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues * * *." *Ibid*.

Similarly, in shaping the commercial/non-commercial dichotomy, this Court noted in *Bolger* that "[a] company has the full panoply of protections available to its direct comments on public issues * * *." 463 U.S. at 68 (citing *Cent. Hudson*, 447 U.S. at 563 n.5). Where one of the corporation's products is itself the subject of, or closely intertwined with, one of those "public issues," it would effectively gut these explicit holdings and statements to exclude any manufacturer commentary about the product from the same level of First Amendment protection as other corporate speech about public issues receives.

Ironically, the result of excluding product-related speech from full First Amendment protection would be to inhibit communications regarding the very issue as to which a corporation possesses the greatest resources and information to make valuable contributions to the debate. Surely, this Court did not intend in *Bolger* to create so questionable an exception to its otherwise all-encompassing conclusion that corporations have "the full panoply" of First Amendment rights to contribute to public debates.

When viewed from the regulatory perspective, a dichotomy between product-related and non-product-related corporate expression is equally indefensible. Corporate expression about subjects other than the characteristics of the corporation's products is ultimately just as likely to be motivated by

the desire to preserve or expand sales as is the corporation's speech directly about its products – as, indeed, the California Supreme Court found to be true in this case. Nor does there appear to be any difference in the level of legitimate governmental interest in regulating the two forms of expression. As this case so clearly demonstrates, speakers often proceed on the assumption that consumers may be induced to purchase or not purchase products on the basis of factors other than the product's quality or safety.

B. Recognition Of A Corporation's Fully Protected Right To Contribute To Public Debate About Its Products Will Not Hamper Appropriate Regulation Of Truly Commercial Corporate Speech Regarding The Products.

Giving full First Amendment protection to a manufacturer's product-related speech when that speech constitutes participation in the debate on a subject of public interest and importance will not unduly impair reasonable and appropriate government regulation of false or misleading commercial advertising or other forms of consumer fraud. For the most part, a corporation's promotion of its products will have little or no relevance to debates on important public issues, and in such situations its expression is properly classified as commercial speech. While not stripped of all First Amendment protection, such speech is subject to appropriate regulation to protect against false or misleading statements.

Where, however, a product's characteristics are at the center of a public debate, and the producer's commentary about its product constitutes meaningful participation in that debate, any limitation of government regulatory powers would simply be the inescapable outgrowth of the need to preserve a debate on public matters that is "uninhibited, robust, and wide-open * * *." *New York Times*, 376 U.S. at 270. In *New York Times*, this Court held that expression that concededly caused substantial harm to private individuals

nonetheless must be protected, in order to ensure such uninhibited public interchange. *Ibid*. This was simply a specific example of a general proposition: whenever speech must be fully protected in order to ensure free and open debate on a matter of public concern, some restriction on governmental authority must be tolerated regardless of the content of that speech.

There will, of course, be borderline situations in which it is debatable whether corporate, product-related speech is properly classified as commercial. The central inquiry should be whether product marketing is the dominant character of the speech, and whether any references to public controversy are merely incidental to the communication. In such circumstances, the promotional efforts will generally be properly classified as commercial speech.

The Court can rely upon a variety of factors in separating manufacturer or producer speech about a product that is to receive full First Amendment protection from that expression that is to be properly classified as commercial speech. Relevant considerations would include (1) whether the communication is made in response to an attack on the product; (2) whether the linkage between the product and any public commentary is either gratuitous or remote; (3) whether the communication touts a specific brand (rather than simply mentioning it for the narrow purpose of speaker identification), even though the brand itself is not inherently part of the public debate; and (4) whether the communication includes a direct promotion of sale.[2]

When, however, reference to a product is "inextricably intertwined" with genuine commentary on a public issue, both this Court's precedents and the interests of free expres-

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[2] The fact that the corporate communication takes the form of an advertisement, however, should have only limited relevance to this inquiry.

sion dictate that such references receive the full protection of the First Amendment. See *Riley* v. *Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988) ("[W]here * * * the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. *Therefore, we apply our test for fully protected expression*.") (footnote omitted) (emphasis added).

This may mean that society must accept a somewhat higher risk of exposure to inaccurate speech. But that is the price that the First Amendment exacts in order to ensure robust, uninhibited expression of views. The wisdom of this trade-off is a fundamental premise of our constitutional jurisprudence, and no less sound in the context of debates over product utility and safety than in any other public debate.

CONCLUSION

The judgment of the Supreme Court of California should be reversed.

Respectfully submitted.

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