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 California Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When a corporation participates in a public debate—writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance—may it be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions?

2. Even assuming the California Supreme Court properly characterized such statements as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation, California Manufacturers and Technology Association, California Chamber of Commerce, and New England Legal Foundation respectfully file this brief amicus curiae in support of Petitioners.[1]

Pacific Legal Foundation (PLF) was founded 29 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF is an advocate for limited government, individual rights, and free enterprise. For example, PLF filed amicus briefs in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), *Nevada Department of Human Resources v. Hibbs*, Supreme Ct. Docket No. 01-1368, and *Pharmaceutical Research and Manufacturers of America v. Concannon*, Supreme Ct. Docket No. 01-188. PLF also filed an amicus brief in this case in the court below and supporting the petition for a writ of certiorari.

The California Manufacturers and Technology Association (CMTA) (formerly the California Manufacturers Association) works to improve and preserve a strong business climate for California's 30,000 manufacturers, processors and technology based companies. Since 1919, CMTA has worked with state government to develop balanced laws, regulations, and policies that stimulate economic growth and create new jobs while safeguarding the state's environmental resources. CMTA

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

represents businesses from the entire manufacturing community—a segment of California's economy that contributes more than $250 billion annually and employs more than 2 million Californians.

The California Chamber of Commerce is a voluntary, nonprofit, California-wide business association with more than 15,000 members, both individual and corporate, who represent virtually every economic interest in the state. Ninety percent of the Chamber's members are small- or medium-sized businesses which it represents before the Legislature, local governing bodies, and the courts on a broad range of issues affecting business. The Chamber is involved with legislative, regulatory, and judicial issues involving corporate free speech and the business community.

New England Legal Foundation (NELF) is a nonprofit public interest law firm, incorporated in Massachusetts in 1977. Its membership consists of large and small corporations from all parts of New England and the United States, law firms, and individuals who believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF regularly appears before this Court in cases raising issues of general economic significance to the national business community. *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Amici will augment Nike's arguments by illustrating the wide range of situations that will be affected by the California Supreme Court's decision in this case. Amici also urge the Court to abandon the current commercial speech doctrine, which no longer provides adequate guidance in a time when commercial and noncommercial speech are blurred beyond the ability of courts to separate them.

SUMMARY OF ARGUMENT

Over the past 60 years, this Court's approach to speech uttered by business interests has ranged from zero protection (*Valentine v. Chrestensen*, 316 U.S. 52 (1942)), to very high protection (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)), to a four-part test (*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)), which has itself undergone revision (*Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (upholding a regulation outlawing Tupperware parties on a university campus); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (when a regulation constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product and the ban serves an interest unrelated to consumer protection, it will be subject to a heightened form of First Amendment scrutiny akin to strict scrutiny.)). There have been conflicting analyses depending on the speaker (*Bates v. State Bar*, 433 U.S. 350, 384 (1977), and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978) (lesser protection accorded to attorney solicitations) and the social worth of the activity promoted (*Compare Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342, 348 (1986) (restrictions on advertisements for legal gambling facilities do not violate the first amendment) *with Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (restrictions on solicitations for charity struck down)). The divergent lines of commercial speech jurisprudence have produced a well of confusion, the most extreme example of which is the California Supreme Court decision below.

Looking to the future, corporate speech takes many different forms and addresses issues far beyond offering to sell widgets at low, low prices. Even when the speech is fairly straightforward in its attempt to bolster the bottom line, it is so frequently intermingled with otherwise protected speech that

courts simply cannot determine where the speech falls in the tangled web of cases comprising the "commercial speech doctrine." The decision of the California Supreme Court cannot be reconciled with the First Amendment. It can serve only as authority for other courts to ratchet downward the protection due not only to commercial speech, but to any speech that has even the slightest element of commercial gain for the speaker. The decision below should be reversed.

ARGUMENT

I

THE CURRENT COMMERCIAL SPEECH DOCTRINE LEADS TO UNPREDICTABLE, AND TROUBLING, RESULTS

The commercial speech doctrine as currently applied by this Court and lower courts can lead to highly unpredictable results, with the majority opinion below identified as Exhibit A. Pulling a little of this and a little of that from a variety of this Court's opinions, a majority of the California Supreme Court developed a new doctrine unlike any this Court—or any other court—ever articulated. Petitioners' Appendix (Pet. App.) at 17a (describing the new "limited purpose" definition of commercial speech). The court below held that "*when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception*, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." Pet. App. at 17a-18a. The court tries to downplay the nature of its holding, claiming that it merely means "that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." Pet. App. at 2a. There is, of course, nothing to prevent other courts from considering this reasoning persuasive enough to depart

from the consumer fraud context to which the court tries to limit it.

The decision below is the result of this Court's oft-changing, but mostly derisive, approach to corporate speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. at 566, this Court formulated a four-part test against which restrictions on commercial speech would be weighed:

> For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

This Court later expanded *Central Hudson*'s inherent flexibility. *See, e.g.*, *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. at 480 (requiring a "reasonable fit" rather than the least restrictive means to comply with the fourth prong). Unfortunately, this flexibility has "left both sides of the debate with their own well of precedent from which to draw," Floyd Abrams, *A Growing Marketplace of Ideas*, Legal Times, July 26, 1993, at S28. *See also* Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1222 (1983) ("commercial speech" was "an empty vessel into which content is poured").[2]

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[2] Justice Blackmun thought that *Central Hudson's* "chickens have come home to roost" when Cincinnati banned commercial newsstands for the sole reason that commercial speech was deemed less valuable than other speech. *City of Cincinnati v. Discovery*

(continued...)

This Court has been unable to apply the *Central Hudson* analysis in any predictable way. *See, e.g.*, *44 Liquormart*, 517 U.S. at 527 (Thomas, J., concurring) (courts have had difficulty in applying the Central Hudson balancing test "with any uniformity"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 419-20 ("This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category. . . . The absence of a categorical definition . . . is also a characteristic of our opinions considering the constitutionality of regulations of commercial speech."). Many lower courts have expressly noted their struggle to apply *Central Hudson*. *See, e.g.*, *Nordyke v. Santa Clara County*, 110 F.3d 707, 712 (9th Cir. 1997) (striking down a fairground lease term prohibiting gun shows, appellate court described this Court's commercial speech cases, concluding that "the *Central Hudson* test is not easy to apply"); *see also Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998) (quoting *Discovery Network*, 507 U.S. at 419). Moreover, this Court has noted the entreaties of "certain judges, scholars, and amici curiae" to repudiate *Central Hudson* and "implement[] a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001).

The commercial speech doctrine has become nearly impossible to apply because "commercial speech" is often extremely difficult, if not impossible, to identify. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 631 (1990) (Kozinski & Banner).

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[2] (...continued)
Network, Inc., 507 U.S. 410, 436 (1993) (Blackmun, J., concurring). This sentiment applies with equal validity to the California Supreme Court's decision below.

This Court has long recognized that speech can serve dual functions.

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen v. California, 403 U.S. 15, 26 (1971). The duality of commercial and noncommercial speech becomes critically important when overlaid with the Court's treatment of false or misleading speech. Traditionally, in the realm of noncommercial speech, the government is restrained from acting as the arbiter of truth and falsity. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."). Moreover, the state may not punish its citizens for disseminating false noncommercial information. *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) ("erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "); *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 783 (1978) (corporations enjoy same degree of constitutional protection as individuals for direct comments on public issues; thus, corporate sponsored editorials should not be subject to government regulation of falsity); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389-90 (1992) (noting the

difficulty in regulating only "false" advertising); *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1094 (S.D.N.Y.), *aff'd*, 747 F.2d 114 (2d Cir. 1984) ("courts are not always able to determine whether an advertising claim is true or false"); *Licata & Co., Inc. v. Goldberg*, 812 F. Supp. 403, 408 (S.D.N.Y. 1993) ("Robust debate between competitors . . . [is] encouraged as part of the hurly-burly inherent in a free market system, and indeed an open society."). *Cf. Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893, 898-99 (D.C. Cir.1984) (suggesting that First Amendment prohibits governmental assessment of the deceptiveness of political speech); *Rudisill v. Flynn*, 619 F.2d 692, 694 (7th Cir.1980) (footnote omitted) ("We do not regard intentional misstatements of fact made during an election campaign as 'election frauds' in the ordinary sense. The merits of a ballot issue are matters reserved for public and private discussion and debate between opponents and proponents."). Courts' difficulties in ascertaining the truth or falsity (much less misleading nature) of corporate speech leads to highly unpredictable results. The decision of the court below, which would subject all corporate speech to this analysis, is unworkable as a constitutional doctrine.

II

CORPORATE SPEECH PLAYS AN IMPORTANT ROLE IN A FREE SOCIETY AND SHOULD THEREFORE ENJOY FULL FIRST AMENDMENT PROTECTION

Corporate speech enriches public debate by counteracting the dominance of the few media megacorporations, and of government officials who can command free access to the press and other means of disseminating information simply by virtue of their position. David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 Hastings Const. L.Q. 541, 571-72 (1991) (citing Gurevitch & Blumler, *Political Communication Systems and Democratic Values*, *in* Democracy and the Mass Media

277-78 (1990); M. Yudof, *When Government Speaks* 6-9 (1983)). Given that most individual citizens either cannot or choose not to compete in public debates dominated by the press and the government, adding a component of corporate speech provides "a more diverse discourse than a debate dominated by two, so long as the third does not merely echo the others." *Id.* at 571-72 (citing M. Yudof, *supra*, at 90-110, 161-64). Government may not shut off one side of a public debate because of disagreement with the position sought to be expressed. *See, e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Mosley*, 408 U.S. 92. Relegating commercial speech to second-class status accomplishes the same thing, allowing the government to skew the democratic process to achieve a preordained result and reflecting a mistrust of citizens' ability to make personal choices based on free and open debate. Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: the Case of the Smoking Controversy*, 24 N. Ky. L. Rev. 553, 579-80 (1997).

Worse, by permitting restrictions on commercial speech, the Court assumes that consumers are unable to separate the wheat from the chaff. There are two problems with this approach. First, consumers frequently demonstrate their ability to view corporate speech with an awareness of the self-interested source of the information. For example, a marketing trend arose in the 1980s and 1990s in which many companies sought to profit from appearing to be ecologically sensitive by "frantically relabeling, repackaging, and repositioning products." David Hoch & Robert Franz, *Eco-porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 Alb. L. Rev. 441, 442 (1994) (citing Jaclyn Fierman, *The Big Muddle in Green Marketing*, Fortune, June 3, 1991, at 91). In 1990, a survey noted that 26% of all new household items "boasted that they were ozone-friendly, recyclable, biodegradable, compostable, or

some other shade of green." *Id.* Despite these claims, an environmental research organization found that "nearly 47% of consumers dismiss environmental claims as 'mere gimmickry.' " *Id.* Given the time and space limitations of the various media outlets, advertising copy is necessarily incomplete. Most advertisements contain more than one message with different meanings to different people. *See* Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. Rev. 657, 672-76 (1985). "Consumers are wary whenever they discern that the self-interest of the advertiser would be served by their own uncritical belief in what the advertiser asserts." Lillian R. BeVier, *Competitor Suits for False Advertising under Section 43(a) of the Lanham Act: a Puzzle in the Law of Deception*, 78 Va. L. Rev. 1, 8 (1992).

People are not only quite capable of looking out for their own interests, but are also capable of organizing counter-speech to corporate communications. Frequently, this takes the form of boycotts. *See, e.g.*, CNN, *Environmental campaigners take aim at oil companies* (May 30, 2002) (http://www.cnn.com/2002/WORLD/europe/05/30/oil.environment.groups.glb/index.html) (visited Jan. 29, 2003) (Greenpeace, Friends of the Earth, and World Wildlife Fund urge boycott of oil companies, specifically identifying their action as a response to corporate political contributions); Jenny Strasburg, *Ban on Israeli goods has shoppers in uproar: Some demand Rainbow co-op end boycott*, S.F. Chron., Dec. 5, 2002, at B-1 (grocery store's boycott of Israeli products led to counter-boycott by local Jewish community). Boycotting is such a popular response to corporate speech that an organization called "Boycott Watch" keeps track of all the major boycott actions. *See* www.boycottwatch.org.

Second, denying full protection to commercial speech for this reason ignores the fact that people need to listen to speech from noncommercial sources with an equal amount of skepticism; even core political speech can be rife with

falsehoods and misleading statements. In fact, the blurry, shifting line between political and commercial speech defies capture and definition. While commercial speech "may not affect how people are governed as directly as political speech does, [] it indirectly influences people's attitudes and values about how they should be governed." Andrew S. Gollin, *Comment Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 Marq. L. Rev. 873, 915-16 (1998) (citing Michael G. Gartner, *Advertising and the First Amendment* 9 (1989)). Furthermore, the free flow of commercial speech allows advertisers and consumers to economize their time and effort in deciding how to allocate their resources. *Id.*

> The operation of commercial enterprises and the quality of their products and services give rise to inescapable social and political implications. The very fact that those who seek to reduce free speech protection for "commercial speech" are today so anxious to exclude from that less protected category expression about such products and services other than advertising tends to confirm the inherently ideological message of all commercial speech.

Redish, 24 N. Ky. L. Rev. at 578.

Reducing the First Amendment protection of corporate speech threatens to chill protected speech especially when a business has to respond to adverse publicity. Newsmagazines such as 60 Minutes or public interest organizations have the luxury of spending as much time and money as they wish on investigative reporting before airing adverse publicity. By contrast, an effective corporate response must be made almost immediately to avert or minimize harm or simply to avoid being defined by its detractors. This Court has previously exhibited concern for corporations placed in the position of having to respond to the speech of others. In *Pacific Gas & Electric Co.*

v. Public Utilities Commission, 475 U.S. 1 (1986), the issue was whether a state regulatory commission could require a utility company to permit an activist group to use its billing envelopes to distribute an insert expressing views with which the utility vehemently disagreed. The plurality found that the utility would "feel compelled to respond," *id.* at 16, and characterized the Commission's order as one that actually forced a response. *Id.* at 15 n.11. The court below failed to consider this complication when it concluded that the facts underlying Nike's campaign were "more easily verifiable by the disseminator" and "less likely to be chilled by proper regulation." Pet. App. at 20a. "A strict standard of 'absolute truthfulness' means a besieged corporate speaker with little time to investigate allegations responds at its own risk, creating a 'Hobson's choice' where responding or not responding carries different but equally serious consequences." Richard O. Faulk, *A Chill Wind Blows: California's Supreme Court Muzzles Corporate Speech*, 15 Andrews AIDS Litig. Rep. 10 (2002). As Justice Chin noted in dissent below:

> While Nike's critics have taken full advantage of their right to "'uninhibited, robust, and wide-open'" debate, the same cannot be said of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike's critics enjoy . . . .

Pet. App. at 31a (Chin, J., dissenting) (citations omitted).

Companies—and even entire industries—routinely are called upon for rapid response to attacks upon their business practices. For example, the past few years have seen self-proclaimed health advocates excoriate certain restaurant chains for "supersizing" meal portions and thus "causing" obesity in their patrons. With accusations multiplying, the National Restaurant Association created a "Rapid Response Program" specifically designed to "rebut denigrating and

negative portrayals of the restaurant industry wherever they occur in the media." *See Rapid Response Program*, http://www.restaurant.org/pressroom/rrlist.cfm (visited Feb. 8, 2003) (posting letters sent to the editors of SmartMoney Magazine, the Washington Post, the Pittsburgh Post-Gazette, USA Today, and others). Fortune magazine recently noted that McDonalds launched a public relations campaign to counteract the adverse publicity surrounding the filing of such a lawsuit. The article cautions, however, that in California, such defensive claims that food products can be a part of a nutritious diet may lead to liability under the unfair competition law at issue in this case. Roger Parloff, *Is Fat the Next Tobacco?: For Big Food, the Supersizing of America is Becoming a Big Headache*, Fortune (Jan. 21, 2003) (http://www.fortune.com/fortune/articles/0,15114,409670-2,00.html) (visited Feb. 10, 2003). *See also Committee On Children's Television, Inc. v. General Foods Corp*., 35 Cal. 3d 197 (1983) (permitting consumer group's lawsuit against supermarkets, cereal manufacturer, and advertising agency to go forward under Cal. Bus. & Prof. Code § 17200, where lawsuit alleged that advertising for Super Sugar Crisp, Cocoa Crispies, and similar cereals misled parents and children into thinking these "candy breakfasts" provided a nutritional start to the day).

The Court is not unfamiliar with the types of debates spawned by commercial enterprises. In *Bose Corp. v. Consumers Union of United States, Inc*., 466 U.S. 485 (1984), this Court held that an article in Consumer Reports making unflattering comments about stereo speakers was entitled to full First Amendment protection. *As a matter of constitutional law*, it makes no sense to hold that the assertions in Consumer Reports Magazine are so much more objectively verifiable and valuable to society than Bose's press releases in response to

those same magazine articles.[3] Yet, under the commercial speech doctrine—especially as applied by the California Supreme Court—the former receive full First Amendment protection while the latter do not. *See* Redish, 24 N. Ky. L. Rev. at 568-69.

III

CENTRAL HUDSON CANNOT ADEQUATELY PROTECT THE INTERMINGLED SPEECH PREVALENT IN MODERN, INNOVATIVE CORPORATE SPEECH

A profit motive, in and of itself, does not render speech unprotected. *Virginia Pharmacy*, 425 U.S. at 761-62. Instead, this Court held in *Virginia Pharmacy* that the speech is reduced to less-favored status only when it does "'no more than propose a commercial transaction.'" *Id.* at 771 n.24 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). The Court has thus far relied on "common sense" to differentiate between commercial and noncommercial speech. *Id.* The two "common sense" distinctions are (1) that commercial speech is more verifiable than other types of speech and (2) that commercial speech is more durable than other types of speech. *Id.*, *see also Central Hudson*, 447 U.S. at 564 n.6. Both distinctions have been criticized by judges and scholars. *See, e.g.*, Kozinski & Banner, 76 Va. L. Rev. at 635-38; Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 Minn. L. Rev. 289, 296-97 (1987); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev.

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[3] Consumer Reports is not immune to charges that it engages in biased reporting. *See Suzuki Motor Corp. v. Consumers Union of United States, Inc.*, 292 F.3d 1192, 1203 (9th Cir. 2002) (finding that the publisher of Consumer Reports had a financial motive to falsify test results related to the propensity of a Suzuki Samurai to rollover on sharp turns).

1, 31-32 (2000). Given that these distinctions no longer appear a solid foundation for diminished constitutional protection, and given the innovative new methods of advertising and marketing in contemporary society, reliance on a "common sense" approach can lead only to confusion.

In *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 68 (1983) (quoting *Central Hudson*, 447 U.S. at 563 n.5), this Court held that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech" because "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." The Court reiterated this holding in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), in which a state supreme court sanctioned a lawyer for running deceptive newspaper advertisements for his services in bringing personal injury actions related to use of Dalkon Shield contraceptives. Because some of the advertisements contained statements regarding the legal rights of persons injured by the Dalkon Shield, the Supreme Court recognized that such statements "in another context, would be fully protected speech." *Id.* at 637 n.7. Based on these cases, the Third Circuit Court of Appeals found that advertisements by rival health care insurance companies that included information about health care insurance and delivery—matters indisputably at the center of public debate—do not escape the commercial speech category. *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 937 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990). In each of these cases, the court suppressed noncommercial speech related to important public debates for the sole reason that it was coupled with commercial speech. The patronizing assumption that people cannot discount speech made by someone with an interest in a particular outcome has now led to a California decision in which the corporate side of

a public debate is stifled in its entirety. Pet. App. at 31a (Chin, J., dissenting) (arguing that Nike's speech is deprived of First Amendment protection only because the company "competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods").

R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992), suggests a different approach. In that case, this Court held that even speech that normally receives less First Amendment protection may not be regulated in such a way that the state discriminates on the basis of content or viewpoint. A number of lower courts have either applied or considered applying *R.A.V.* to content-based commercial speech restrictions. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1331 n.3 (9th Cir. 1997) (citing *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994)) (acknowledging potential application of *R.A.V.* to content-based commercial speech regulation); *Hornell Brewing Co., Inc. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *R.A.V.* and *Central Hudson* to speech regulation without deciding which is required); *Citizens United for Free Speech II v. Long Beach Township Board of Commissioners*, 802 F. Supp. 1223, 1232 (D.N.J. 1992) ("It is clear from the Supreme Court's recent decision in *R.A.V. []*, that commercial speech must be protected by the usual strictures against content-based distinctions.").

A. Marketing and Advertising Are No Longer Necessarily Identifiable or Separable from Noncommercial Speech

As a corollary to the government's ability to regulate commercial transactions, the government also assumes the ability to regulate commercial speech. *See* Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777, 780 (1993). The Court has already conceded that "commercial speech" is not easily defined. *See, e.g., Rubin v.*

Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring) ("[T]he borders of the commercial speech category are not nearly as clear as the Court has assumed."); *Bolger*, 463 U.S. at 81 (Stevens, J., concurring) ("[T]he impression that 'commercial speech' is a fairly definite category of communication . . . may not be wholly warranted."). These "ambiguities" however, threaten to overcome the rest of the category.

The speech in this case involved press releases, letters to the editor, letters to university athletic directors, and the like describing Nike's overseas labor practices. Pet. App. at 21a. Far from the prototypical commercial speech of offering to sell X product for Y price (*see Virginia Pharmacy*, 425 U.S. at 761), the speech at issue in this case was intended to rehabilitate a corporate image as well as provide information to the public on a matter of broad concern. Extending the lesser protection of the commercial speech doctrine to this type of speech threatens a wide variety of public relations communication. These include:

"Product placement," an arrangement whereby a movie studio incorporates certain commercial products into its film in exchange for cash or free use of the product. Steven L. Snyder, *Note: Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?* 1992 U. Ill. L. Rev. 301 (1992). For example, in 1990, Disney reportedly charged advertisers $20,000 to show the product without comment, $40,000 to show the product and have an actor mention the product's name, and $60,000 for an actor to be shown using the product. *Id.* at 305 (citing *Ad Follies*, Advertising Age, Dec. 24, 1990, at 24). Product placement began in feature films and television, but other media have followed suit. For example, author Beth Ann Herman featured a Maserati in her novel *Power City*. The protagonist drives a Maserati whose "V-6 engine had two turbochargers, 185 horsepower and got up to 60 in under 7 seconds." *Id.* at 308 n.65 (citing Randall

Rothenberg, *Now, Novels Are Turning Promotional*, N.Y. Times, Jan. 13, 1989, at D5). In exchange, a Beverly Hills Maserati dealership threw a $15,000 party for Herman that attracted nationwide television coverage. *Id.* Even record albums are not exempt. Barbara Mandrell's album, *No Nonsense*, was made with the financial support of the No Nonsense panty-hose manufacturer. *Id.* at 308 n.67 (citing Robert Epstein, *Public-Interest Group Tilts at Commercial Windmills*, L.A. Times, June 6, 1991, at F7).[4]

Sponsorships, by which a company underwrites the production of a television show, concert, or sporting event. The early days of television were marked by shows like Texaco Star Theater. "Soap operas" were so called because they were sponsored originally by Proctor & Gamble. *Procter & Gamble*, New Media Age, Apr. 11, 2002, at 28. Animal lovers will remember "Mutual of Omaha's *Wild Kingdom*." R.J. Reynolds has sponsored the Winston Cup series since 1970. Chris Roush, *Red Necks, White Socks, and Blue-Chip Sponsors*, Bus. Wk., Aug. 15, 1994, at 74, *cited in* Daniel Helberg, *Note and Comment Butt Out: an Analysis of the FDA's Proposed Restrictions on Cigarette Advertising under the Commercial-Speech Doctrine*, 29 Loy. L.A. L. Rev. 1219, 1222 n.23 (1996)).

Testimonials became part of main-stream marketing in the 1920s, when Pond's cold cream paid "Great Ladies" (including Mrs. Reginald Vanderbilt, Queen Marie of Rumania, and the Duchess de Richelieu) to sing the praises of the

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[4] In the age of TiVo, in which viewers can use computer technology to download broadcasts minus the commercials, advertisers have used product placement and other ways to interject favorable mentions of their products into the programs themselves. *See* Daniel Lyons, *Play it Again, TiVo*, Forbes (Jan. 28, 2003) (http://www.forbes.com/ 2003/01/28/cz_dl_0128tivo.html) (visited Feb. 5, 2003).

moisturizer in exchange for contributions to charity. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 125, 164-65 (1993). Lately, however, it is not necessarily apparent that those giving testimony are paid to tout the product. For example, actress Kathleen Turner appeared on CNN in August, 2002, to discuss her struggles with rheumatoid arthritis. She failed to mention that the makers of Enbrel, a drug that battles the condition, paid her to appear. CBSNEWS.com, *Stars Profit from Covert Drug Pitches*, Aug. 29, 2002 (http://www.cbsnews.com/stories/2002/08/29/entertainment/main520196.shtml) (visited Feb. 12, 2003). Similarly, Lauren Bacall appeared on "NBC Today," telling the story of a friend who had gone blind due to macular degeneration and then discussed a new drug that could prevent blindness from that cause. Novartis, the maker of the drug, paid for Ms. Bacall's appearance on the show, a fact revealed to the audience by neither Ms. Bacall nor NBC. Melody Peterson, *Drug Companies Turn to Celebrities for Advertising*, N.Y. Times, Aug. 14, 2002 (http://www.bayarea.com/mld/cctimes/3857601.htm) (visited Feb. 12, 2003).[5]

Music videos also blur the line between commercial and noncommercial speech. *See* Kozinski & Banner, 76 Va. L. Rev. at 641. Music itself, of course, is entitled to full First Amendment protection. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). A primary function of a music video is to promote the artist and the song, in hopes of persuading consumers to buy the album on which the song appears. Yet whether the video is treated as lesser-protected commercial speech is not obvious under the Court's current jurisprudence. The Kentucky Supreme Court, apparently the only court to consider this issue, held in *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001), that

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[5] In response to public outcry, CNN now requires full disclosure of commercial endorsements for any guest who appears on the network.

> While music videos are not produced primarily for the sale of the video but, rather, the underlying song, this does not strip them of their First Amendment protection. Music videos are in essence mini-movies that often require the same level of artistic and creative input from the performers, actors, and directors as is required in the making of motion pictures. Moreover, music videos are aired on television not as advertisements but as the main attraction, the airing of which, consequently, is supported by commercial advertisements. Simply put, the commercial nature of music videos does not deprive them of constitutional protection.

This holding provoked a dissent that seems equally plausible:

> A music video stands to an album the same way that a movie "trailer" or "teaser" stands in relation to a movie; it represents an attempt to entice a customer to purchase the right to hear or see the larger work. Indeed, music videos are "doubly" commercial speech. MTV, VH1, the Nashville Network, and other music-video cable channels select and show the videos that they believe will generate the highest advertising revenue. The video channels' unwillingness to broadcast controversial materials—materials likely to spook boycott-wary advertisers—provide additional evidence of the essentially commercial nature of the undertaking.

Id. at 534 (Keller, J., dissenting). The disagreement between the majority and dissent in *Montgomery* is significant only because the categorization of the video impacts the level of protection to which it is entitled under the First Amendment.

"Virtual advertising," is a form of digital technology that allows advertisers to insert computer-generated brand names, logos, or animated images into previously recorded television

programs or movies. Askan Deutsch, *Sports Broadcasting and Virtual Advertising: Defining the Limits of Copyright Law and the Law of Unfair Competition*, 11 Marq. Sports L. Rev. 41, 42 (2000). It uses computers to place still or video images into live video broadcasts in real time so that they look as if they are part of the original scene. For example, several Major League Baseball teams have made use of virtual advertisements along the wall behind home plate. *Id.* (citing Stuart Elliott, *Real or Virtual? You Call It*, N.Y. Times, Oct. 1, 1999, at C1). Virtual advertising blurs the line between television programming and commercials. *Id.* at 44.

"Stealth" or "guerilla" marketing is a new way of using undercover actors to promote a product without the public being aware that the actors are paid by the product's manufacturer. For example, the United States arm of Sony Ericsson Mobile Communications Ltd. hired men and women to pose as tourists at tourist attractions in New York City, then ask passers by to take their picture with Sony's new phone/digital camera. Sony also hired attractive women to sit at opposite ends of a bar in a nightclub and play a computer game on their phones while engaging other patrons in conversation about their cool new toy. Under no circumstances are the actors supposed to tell the passers by or club patrons that they are employed by Sony. Suzanne Vranica, *Advertising: That Guy Showing off His Hot New Phone May Be a Shill*, Wall St. J. (July 31, 2002). Moreover, the actors do not make any type of sales pitch, they simply demonstrate the product and make flattering comments about it. *Id.* Similarly, the public relations firm representing a new flavored-water brand dispatched young women fitting the target demographic to trendy Manhattan bars and clubs to be seen drinking the specific brand and making favorable comments about it to unsuspecting bar patrons. Michael Harrelson, *The Fat Man Sings: Meet the 300-Pound Guerrilla of Undercover Marketing*, Nightclub & Bar Magazine (Feb. 2002) (http://www.nightclub.com/magazine-/February02/

cover.html) (visited Sept. 24, 2002) (profiling Jonathan Ressler, CEO of Big Fat, Inc., a public relations firm that is at the vanguard of undercover marketing techniques). *See also* Ed Brown, *Hold the Olives: Martini Marketing*, Fortune, Mar. 2, 1998, at 37 (describing how Hennessey recruited hip young barhoppers to drink "Hennessey martinis" and other cognac drinks undercover at trendy bars during a five year campaign to reach 21-32 year old drinkers); Michelle Goldberg, *Confessions of an Undercover Drink Fink*, Salon (Dec. 9, 1997) (http://www.salon.com/media/1997/12/ 09media.html) (visited Sept. 28, 2002) (first-hand account of methods used to sell cognac martinis without expressly offering to conduct a commercial transaction).

This type of marketing is not restricted to high-tech gadgets and liquor. Record companies may plant attractive young women in record shops, paid to notice the album in a customer's hand and helpfully suggest other artists the customer may like. Thomas Nord, *Stealth marketing—is it the next big thing or just a big fat flop?*, The Courier-Journal (Louisville, KY) (Aug. 3, 2001) (http://www.courier-journal.com/features/ columns/popculture/fe20010803pop.html (visited Sept. 24, 2002). Scooter companies pay college students to hang outside coffee shops, striking up conversations with customers and casually mentioning their new rides. Gerry Khermouch & Jeff Green, *Buzz Marketing*, Bus. Wk., July 30, 2001, at 54. Children are given copies of hot new portable video games, urging them to bring it to class and show all their friends. *Id.* at 55.

Providing helpful advice (while selling a little something on the side) is also a time-honored method of marketing that is evolving into a particularly powerful tool on the Internet. Using this method, an entrepreneur seeks out chat groups on the Internet that discuss issues related to what he has to sell. For example, someone who wants to sell bookkeeping software will find (e.g., through Yahoogroups) groups of people who talk

about finances. He will "lurk" long enough to get a feel for the group's discussions, and then start contributing. He will spend the bulk of his time joining in the discussion and some percentage correctly answering questions related to his product. Each of his posts will link to his own webpage where he offers software for sale. After becoming a trusted member of the group, he will find occasional opportunities to suggest a "meeting" via private e-mail to discuss how the software can meet a particular person's special needs. Rex Tincher, *Stealth Marketing in Usenet News Groups* (http://www.tincher.to/stealth.htm) (visited Feb. 12, 2003).

Another common incarnation of this technique is found on websites geared toward parents, mothers in particular. Baby food manufacturers have websites chock full of helpful information as to when baby should achieve developmental milestones, advice how to encourage baby to eat new foods, health advice for the expectant and breastfeeding mother, and so on. Some even have a doctor on staff to answer e-mail inquiries. Of course, the websites also provide information for purchasing products, but one may peruse the sites at length without ever making a purchase. *See, e.g.*, website for Gerber products, http://www.gerber.com/main.asp (visited Oct. 29, 2002) (home page points readers to information about nutritional development, new products, and "expert advice, anytime, day or night"); website for Beech Nut products, http://www.beechnut.com/feeding/index.htm (visited Feb. 12, 2003) (tips on immunizations, allergies, babysitters, and suggested menus for babies of different ages).

Websites as commercial speech have not yet generated much caselaw,[6] but, especially as regards lawyer advertising,

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[6] One example is *Ford Motor Co. v. Tex. Dep't of Transportation*, 264 F.3d 493, 505 (5th Cir. 2001), in which Ford challenged a Texas law prohibiting the sale of used vehicles via a website as violating its

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they have generated some law review articles concerned about whether law firms' websites are subject to state rules regarding solicitation. *See, e.g.*, Drew L. Kershen, *Professional Legal Organizations on the Internet: Websites and Ethics*, 4 Drake J. Agric. L. 141, 145 (1999) ("Even if a website or publication is primarily informational, if the content or context indicates the solicitation for a commercial relationship, the website or publication is commercial speech subject to state regulation."); Jesse H. Sweet, *Attorney Advertising on the Information Superhighway: A Crash Course in Ethics*, 24 J. Legal Prof. 201, 210 (2000).[7]

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[6] (...continued)
First Amendment right to speech. The Fifth Circuit held that the advertising and information on Ford's website constitutes commercial speech and, applying *Central Hudson*, upheld the regulation. *See also United States v. Bell*, No. 1:CV-01-2159, 2003 WL 102610 (M.D. Pa. Jan. 10, 2003) (operator of website which promoted tax avoidance was engaged in commercial speech); *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2d Cir. 2000) (domain names may or may not be commercial speech depending on variety of factors).

[7] In *Planned Parenthood Fed'n of America, Inc. v. Bucci*, No. 97 Civ. 0629 (KMW), 1997 U.S. WL 133313 (S.D.N.Y. Mar. 24, 1997), *aff'd*, 152 F.3d 920 (2d Cir.), *cert. denied*, 525 U.S. 834 (1998), the defendant, doing business as Catholic Radio, registered a website at "plannedparenthood.com." However, the website was actually dedicated to the pro-life position and opposed abortion. *Id.* at *5-*6. The defendant argued that his use of plaintiff's mark was noncommercial speech. *Id.* at *9. The court disagreed for two reasons: First, although the use of "plannedparenthood.com" was arguably noncommercial in of itself, it impacted the plaintiff's ability to offer its own services over the Internet. Second, the very use of the Internet is "in commerce" because it requires interstate phone lines to connect. *Id.* at *11-*12.

B. Speech Intended to Bolster a Corporate Image Should Be Fully Protected Under the First Amendment

Corporate image advertising "describes the corporation itself, its activities or its views, but does not explicitly describe any products or services sold by the corporation." Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Sourcebook on Corporate Image and Corporate Advocacy Advertising, 95th Cong., 2d Sess. 1149, 1156 (1978), *quoted in* C.C. Laura Lin, *Note: Corporate Image Advertising and the First Amendment*, 61 S. Cal. L. Rev. 459, 461 (1988). There are, generally, two types of image advertising. The first is advertising that treats the company itself as a product to be sold. For example, lumber giant Weyerhaueser has been reviled by environmentalists for clear-cutting certain forest areas. *See, e.g.*, Gina Binole, *After Buying MacBlo, Weyerhaeuser Won't Commit on Clear-Cutting*, Portland Bus. J. (June 28, 1999) (http://forests.org/archive/canada/weywonts.htm) (visited Oct. 24, 2002). Promoting its image as a responsible steward of the earth, Weyerhauser has publicized its partnership with CARE, one of the world's largest international relief and development organizations. Together, they will teach "sustainable forest management and environmental stewardship to improve the lives of people in developing countries for current and future generations." *See* http://www.weyerhaeuser.com/citizenship-/philanthropy/partnershipwithcare.asp (visited Oct. 24, 2002).[8]

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[8] Similarly, in testimony to Congress, former FDA Commissioner David Kessler noted that tobacco companies engaged in image building through "promotional events labeled as scientific and technical seminars, special journal supplements and video news releases." Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 102d

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This type of image advertising also includes companies that project an ethos of social responsibility and a political philosophy that consumers presumably can share and support through the purchase of the companies' products. For example, The Body Shop sells cosmetics and one might reasonably presume that its communications with the public are intended to sell soap and moisturizers. The company's owner contends that the central mission of business is to improve the world by not only caring for its work force and customers, but also for its communities and the environment. She believes that business should be a force for social good first, and consider bottom line profits second. Cathy L. Hartman & Caryn L. Beck-Dudley, *Marketing Strategies and the Search for Virtue: A Case Analysis of The Body Shop, International*, 20 J. Bus. Ethics 249 (1999). Thus, The Body Shop's mission statement

> specifies that social, environmental, and political values are the fundamental bases of exchange with its constituents. Specifically, the company's first commitment is to "social and environmental change," and, second, to the "financial and human needs" of its stakeholders. Further, its product pledge involves "the protection of the environment, human and civil rights" within the cosmetics industry.

Id. Whether it is Weyerhaeuser's forest management or the Body Shop's focus on "natural" skin care reflecting broader environmental concerns, these businesses are speaking on relevant issues that do not come close to asking consumers to buy their products.

The second type of image advertising takes positions on public issues. As such, it is even further removed from actual

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[8] (...continued)
Cong., 1st Sess. 3 (Sept. 12, 1991) (statement of David A. Kessler, M.D., Commissioner of Food and Drugs).

commercial transactions than advertising to promote the company itself as a product. For example, when inexpensive Japanese compact cars began to flood the market, American automakers responded by urging consumers to "buy American."[9] When the president of an American automobile company takes out an advertisement in a newspaper or buys air time on a network to urge people to "buy American," he may argue that by purchasing foreign automobiles Americans are putting other Americans out of work, and that buying his company's cars is a patriotic act. The speech is profit motivated. It proposes a commercial transaction. It directly concerns the economic interests of the speaker, and it is a commercial announcement. However, it also touches on matters of pressing political concern—consumer choice, protectionism, and free trade. Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (1991). "Information about the quality and price of some products may relate to important political issues. For example, a belief that American cars are over priced influences views on foreign car import restrictions, on inflationary price increases for domestic cars, and on the effects of oligopoly . . . ." *Id.* (quoting Daniel Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 382 (1979)).

In *Quinn v. Aetna Life & Casualty Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (1978), a state court trial judge ruled that an

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[9] To assist consumers in complying with this exhortation, Congress passed the American Automobile Labeling Act, which requires passenger vehicles manufactured after October 1, 1994, to have labels specifying their percentage value of U.S./Canadian parts content, the country of assembly, and countries of origin of the engine and transmission. Juanita S. Kavalauskas & Charles J. Kahane, Nat'l Highway Traffic Safety Admin. Report No. DOT HS 809 208, *Evaluation of the American Automobile Labeling Act* (2001).

insurance company's advertisements blaming high insurance premiums on large tort damage awards was commercial speech and, thus, could be enjoined if found to be false or misleading. Plaintiffs involved in on-going personal injury actions sought to enjoin Aetna from continuing publication of statements in certain magazines that criticized the tort system and what Aetna perceived to be excessive damages awarded in many personal injury cases. *Id.* at 548-49, 409 N.Y.S.2d at 474-75. The plaintiffs argued that the advertisements contained misleading statements violating New York law. *Id.* at 549, 409 N.Y.S.2d at 475. Aetna responded that its publications advocating tort law reform were political expression and fully protected by the First Amendment. *Id.* The fundamental disagreement was whether the mixed commercial/political speech should be deemed one or the other. This is a question like, "is *The Wizard of Oz* a black and white film or in color?" Sometimes there is no getting around the fact that it is both. *See* Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-based Relational Framework*, 41 Case Western Res. L. Rev. 1093, 1143 (1991).

The state judge ruled that the statements were commercial speech that could be enjoined if false or misleading. *See Quinn*, 96 Misc. 2d at 553-54, 409 N.Y.S.2d at 478. The court made its ruling despite the fact that Aetna's purpose was to influence potential jurors to give lower damage awards, rather than targeting its statement at consumers who might purchase insurance products. *Id.* at 554, 409 N.Y.S.2d at 478. When the case was removed to federal district court, *Quinn v. Aetna Life & Casualty Co.*, 482 F. Supp. 22, 29 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980) (per curiam), the district court judge concluded that the advertisements were not commercial speech, *id.*, and the Second Circuit affirmed. *Quinn*, 616 F.2d at 40. The federal district judge concluded that the state court judge had "engaged in a fundamental misconception by calling the

advertisements here in question 'commercial speech.'" *Quinn*, 482 F. Supp. at 29.[10]

The pharmaceutical industry has also sponsored political advertisements—"issue ads"—that praise certain candidates' stands on prescription drug legislation. The advertisements are prepared and placed by a nonpartisan group called United Seniors Association, but that group is funded largely by unrestricted educational grants from the Pharmaceutical Research and Manufacturers of America. Thomas B. Edsall, *Drug Industry Financing Fuels Pro-GOP TV Spots*, Washington Post, Oct. 23, 2002, at A11. The drug companies that are members of PhRMA undoubtedly would benefit economically if the positions they are advertising are enacted into law. Under the California Supreme Court's analysis, this core political speech could be transformed into commercial speech entitled to lesser protection.

CONCLUSION

While hard cases may make bad law, *see Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting), sometimes "it is bad law that is creating the hard cases." Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 Conn. L. Rev. 961, 984 (1998). *Central Hudson* falls into this category. The issue before the California Supreme Court in this case should not have been "hard." But until this Court simplifies First Amendment

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[10] *See also Rutledge v. Liability Ins. Indus.*, 487 F. Supp. 5 (W.D. La. 1979), also involving insurance company advertising statements, the court similarly held that the advertisements were not commercial speech because "[t]he ads [made] no attempt to sell insurance or to recommend any particular type of insurance coverage . . . ." *Id.* at 8. Finding the speech to be fully protected noncommercial speech, the district court concluded that issuing an injunction in the case would be tantamount to imposing a prior restraint on publication in violation of the First Amendment. *Id.* at 8-9.

jurisprudence by protecting corporate engagement in public debate, lower courts will continue to struggle and the citizenry will be deprived of all sides of important controversies.

The Court should treat all speech as deserving the same protection under the First Amendment. The government then could regulate commercial speech and mixed speech just as it would political speech: regulation is constitutional where it furthers an important governmental interest, the governmental interest is unrelated to the suppression of free expression, and the restriction on expression is no greater than necessary. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Consumer fraud statutes could still exist, albeit in much narrower form than California's unfair competition law. There is no question that preventing consumer fraud furthers a substantial governmental interest. The critical point is that while the seller is free to make true, false, or misleading claims, he will be liable if buyers rely on those claims to make purchases. *See* Kozinski & Banner, 76 Va. L. Rev. at 651. When there is no reliance, and no harm, then private counterspeech will serve to remedy falsehoods placed before the public.

The judgment of the California Supreme Court should be reversed.

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