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 *AMICI CURIAE* OF SIERRA CLUB, CALIFORNIA CERTIFIED ORGANIC FARMERS, AND CENTER ON RACE, POVERTY AND THE ENVIRONMENT

Patrick Gallagher
(Counsel of Record)
Sierra Club
85 Second Street
San Francisco, CA 94105
415-977-5709

Tamara R. Piety
Univ. of Tulsa
College of Law
3120 E. 4th Place
John Rogers Hall
Tulsa, OK 74104

Thomas McGarity
Univ. of Texas
School of Law
727 E. Dean Keeton St.
Austin, TX 78705

QUESTION PRESENTED

Whether a state government can regulate a corporation's false statements about its labor practices, that were made in order to improve its public image and induce consumers to purchase its products, because commercial speech restrictions are permissible under the First Amendment to ensure the public receives truthful information about corporate products and services?

RULE 29.4(C) CERTIFICATION

Amici curiae certify that 28 U.S.C. § 2403(b) may apply and that this brief has been served upon the Attorney General of California.

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INTEREST OF *AMICI*

The Sierra Club, California Certified Organic Farmers, and Center on Race, Poverty and the Environment submit this brief as *amici curiae* in support of Respondent Marc Kasky.[1]

The Sierra Club is a nonprofit corporation organized under California law, with approximately 740,000 members nationwide, approximately 199,000 of whom reside in California. The Sierra Club is dedicated to exploring, enjoying and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

The Sierra Club's concerns include holding corporations accountable for making false environmental claims in order to exploit environmentally friendly consumers. One of the Sierra Club's campaigns is corporate accountability. This campaign encompasses encouraging corporations to demonstrate their commitment to the environment by signing voluntary codes of environmental conduct. The Sierra Club's particular interest in this case stems from the past, present and future harm to the environment that results from restricting the ability of consumers to directly influence manufacturers' environmental practices by using their purchasing power.

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[1] Letters of consent to the filing of this brief have been filed with Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6 of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person, other than *amici*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

This ability is restricted when there is no check on manufacturers' ability to disseminate misinformation.[2]

California Certified Organic Farmers, Inc. (CCOF) is a 30-year old, non-profit corporation organized under California law. CCOF has over 1200 certified organic farmers and processors in its organic certification program. CCOF's client base represents over 70 percent of organic agricultural production in the State of California, as well as hundreds of food processors throughout the United States, Canada and Mexico. CCOF's goal is to return agriculture to a biological base and away from a food production system based on toxic chemistry. CCOF is accredited by the United States Government to issue a federal organic license on behalf of the United States Department of Agriculture to its clients. Organic certification has been key to building the organic industry and CCOF has been one of the main organizations helping to develop organic standards.

CCOF is concerned when any organization makes certification claims that are without merit. Consumer confidence in the integrity of organic certification has led to annual growth rates of twenty percent within the organic industry for more than a decade. Consumers are willing to pay more for food because they believe that the methods used to produce and process organic food are better for themselves, the environment and wildlife. Allowing a business to make claims that are false or not supported by fact undermines the certification process. It is similar to allowing counterfeit money into circulation; it undermines confidence in the system. CCOF asks the court to protect the

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[2] The Sierra Club has been before the Court as an amicus curiae representing environmental interests in a number of cases. These include *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 122 S.Ct. 2355 (2002); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *United States v. Locke*, 471 U.S. 84 (1985).

integrity of certification claims made in the marketplace and hold claimants to fact based statements.

The Center on Race, Poverty and the Environment provides legal and technical assistance to the grassroots movement for environmental justice. The Center serves individuals and community groups throughout the United States, who struggle against a disproportionate burden of pollution and the disproportionate enforcement of the law. The Center has offices in San Francisco and Delano, California. CRPE often files lawsuits under California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.) – the statute at the heart of this lawsuit – therefore, the organization's ability to represent its clients will be directly affected by the outcome of this lawsuit.

INTRODUCTION

The California Supreme Court properly held that the Constitution does not protect false or misleading public statements about the Petitioner's labor practices made in order to improve its public image and regain lost sales and credibility in financial markets – whether these statements were made in press releases, letters to newspaper editors, letters to the heads of universities and athletic departments, or advertising. Constitutional protection of free speech does not extend to a corporation's dishonest factual representations about its own product or its own operations directed to consumers, or intended to reach consumers or other members of the public, such as lending institutions and purchasers of stock.

SUMMARY OF ARGUMENT

This case is about whether or not Nike will be granted a constitutional right to lie to the public about the facts of its operations in order to promote itself and the sale of its products. Petitioner Nike filed a *demurrer* in the trial

court to Respondent's claim that it made misrepresentations in its public statements offered to rebut the criticism of its overseas labor practices. In reviewing the granting of a *demurrer*, this Court must accept all of Kasky's allegations as true. *Anderson v. Atchison, T. & S.F. Ry. Co.*, 333 U.S. 821, 822 n.1 (1948). Nike claims that it is immaterial whether it has intentionally made false and misleading statements because such lies and misstatements of fact are protected by the First Amendment. This claim conflicts with the very purpose for which *limited* First Amendment protection was extended to *some* commercial speech in the first place – the public's right to receive truthful information about products and services. Nike's claim is antithetical to the commercial speech doctrine.

It is precisely this free flow of information that is essential for consumers to make rational and *informed* choices. Consumers cannot make informed choices when it is difficult, if not impossible, to ascertain truth from fiction because manufacturers may lie with impunity.

Moreover, the confusion created when companies misrepresent, distort, or lie disrupts proper functioning of the market. Truthful and responsible manufacturers are placed at a competitive disadvantage because dishonest market participants can free-ride on the efforts of others. In particular, dishonest manufacturers exploit consumers' desires to purchase eco-friendly products from environmentally friendly corporations by falsely boasting these environmental claims. California has enacted a statute that limits such "green washing" techniques – legislation that will be put in jeopardy if this Court overturns the California Supreme Court's decision in this case.

In response to these weighty concerns, the Petitioner offers only straw men. Contrary to Petitioner's assertion, Nike's comments in this case were *not* about the merits of globalization. Rather the statements were concrete

assertions of *facts* of Nike's labor practices and the conditions under which its products are manufactured. It is impossible to state with any certainty, except as a matter of opinion, whether or not globalization is a "good" thing. By contrast, the working conditions in Nike's factories are not a matter of opinion, but rather facts that consumers are interested in obtaining to make their purchasing decisions. Consumers, large institutional purchasers, lenders, stock analysts and brokers may adjust their purchases or decisions based on this information. Fully aware of this, Nike would like to disseminate information about its labor practices that it feels would find the most favor with these audiences. However, Nike would like to disseminate favorable "information" without regard to its veracity and unfettered by any need to verify these facts – facts that Nike is in the best position to accurately report.

Despite Petitioner's assertions to the contrary, it is no more onerous to require a manufacturer to report facts about its work practices accurately than it is to expect it to provide accurate reports of its earnings for tax purposes or its financial condition to meet securities reporting requirements. The fact that this information may be difficult to compile or may sometimes be inadvertently inaccurate does not absolve the company from the responsibility to report as accurately as it can. Nike is a business entity, not a political organization, and it has a financial incentive connected to its "commentary" that other commentators lack.

Similarly, contrary to Petitioner's assertion that the California Supreme Court's decision unfairly "disadvantages" one side of a "debate," it is Nike's position that would create the disadvantage. Insulating companies from liability for inaccurate advertising of the sort alleged here would disadvantage the public – consumers, investors, analysts, and lenders alike – who have an interest in Nike's operations, how Nike's operations are viewed by the public,

and the effect of the public's view on sales. In addition, companies can gain unfair competitive advantage by falsely boasting about environmentally friendly products when the company has not undergone the expense of developing such products. Any attempts to verify such claims would require investigative journalism, as occurred in this case, but which is unreasonable to expect in most instances.

In a modern consumer society, the relative impotence of the individual consumer, compared to multi-billion dollar corporations, must be augmented by the power of the government to ensure that the information provided to the public is truthful. Protecting the integrity of the marketplace is a traditional function of government, and such regulation is an important governmental vehicle for ensuring that *public goods*, such a clean environment and sustainable environmental practices, are safeguarded.

ARGUMENT

I. False Or Deceptive Environmental Claims In Green Marketing Campaigns Can Injure Consumers And Honest Competitors And May Ultimately Endanger The Environment.

Since the early 1990's, there has been a virtual explosion throughout the United States in "green marketing" – the manufacture and promotion of consumer goods having real (or imaginary) environmental benefits. Common household products boast that they are recyclable, biodegradable, compostable, ozone-friendly, or some other shade of green. Manufacturers claim that wood products are produced only from sustainable harvesting practices, free from clear-cutting or other environmental abuses. Organic food is advertised as being produced without reliance upon agricultural chemicals or biotechnology. Energy is marketed as "clean," generated from wind, water, or solar power, not from the burning of coal or use of nuclear power. Even tuna

fish is claimed to be dolphin free. *See generally* Holch & Franz, *Legal Developments: Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441 (1994).

Such green marketing efforts, which rest upon sound public policy goals, are designed to alter consumer purchasing decisions in a pro-environment way and thereby to reduce air and water pollution, promote energy efficiency, reduce global warming, prevent toxic contamination, protect wildlife, and encourage the sustainable use of natural resources from our farmlands, forests and oceans. The use of such market forces and economic incentives to protect the environment has increased in importance since the limitations of "command and control" government regulation to address the nation's serious and complex environmental problems have become more apparent. Rechtschaffen, *Deference v. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1195 (1998).

In contrast to regulatory regimes that seek to limit the amount of pollution "at the end of the pipe" through discharge permits or emission controls, consumer-oriented solutions rely upon the law of supply and demand, together with increasing public concern for the environment, to reduce pollution at the source. *Id.* Informational approaches provide an incentive for manufacturers to employ environmentally friendly practices in order to make their products more appealing to the public. Market forces – consumer purchasing decisions driven in part by environmental concerns – have changed the dynamics of environmental compliance, making it is a matter of *self-interest* for corporations to voluntarily comply with environmental requirements and even go beyond legally enforceable requirements. Harnessing the power of self-interest in the service of environmental concerns is an effective way to mobilize and accelerate positive change to a

degree difficult to achieve through governmental regulation alone.

Today, an increasing number of Americans consider themselves "environmentalists" and have expressed their concern for the environment by purchasing eco-friendly products. Almost two-thirds of consumers describe themselves as "more likely" to purchase a product because of environmental considerations. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV. 991, 992 (1993). One Gallup poll found that a substantial majority of respondents was willing to change its buying behavior to improve the environment, even if it meant paying a higher price for the product. Carlson, *et al., A Content Analysis of Environmental Advertising Claims: A Matrix Method Approach*, J. OF ADVERTISING at p. 27 (Sept. 1993). Another study estimated that eighty-two percent of consumers would pay at least five percent extra to "buy green." Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV. 991, 992 (1993).

Some "green" consumers base purchasing decisions on the "specific characteristics" of a product, while others, indeed perhaps most, are influenced in their purchasing decision by how a manufacturer claims a product was manufactured. People buy "dolphin-free" tuna not because of the tuna itself, which tastes the same no matter how it is captured, but because they have concern for the health and safety of dolphins. Similarly, with the deregulation of the California energy supply, fierce competition is now taking place in that market, with some competitors urging consumers to purchase from "green" sources of energy. The end product – electricity – is identical. Not buying wood products made from trees harvested in the rain forests is motivated by consumer concerns for endangered species, not by the look of the furniture itself. Other examples abound,

including the example at the heart of this case – whether Nike manufactures its products under sweatshop conditions that prospective consumers find sufficiently offensive so as to affect their purchasing decisions.

While green marketing serves the laudable goal of leveraging market forces to accomplish improved environmental protection, the use of "green washing" techniques by dishonest companies seeking to exploit consumer environmental concerns by misstating the environmental benefits of their products is, unfortunately, on the rise. "Green washing" is harmful to consumers and legitimate competitors alike, not to mention its impact on the environment itself. The inherent conflict is clear. Consumers will buy environmentally beneficial products to induce greater corporate environmental responsibility. Manufacturers striving for greater profits have an incentive to inflate or even lie about the environmental attributes of their products.

Thus, contrary to Petitioner's assertion that its statements in this case are distinct from advertising, which this Court called "the *sine qua non* of commercial profits," Petitioner's Brief at 27, Nike's statements defending its labor practices are directly related to commercial profits. If Nike is allowed to claim a constitutional right to lie in these statements to potential consumers, consumers will make purchasing decisions based on inaccurate information. This will lessen, if not eliminate altogether, consumers' ability to influence manufacturers' choices and, by extension, the benefits those choices provide to the environment.

In 1994, a 10-state attorney general task force found that "green marketing" claims were being made for nearly 10% of all new products introduced into the United States – a 20-fold increase since 1985:

> "Green marketing" has become the marketing craze of the 1990s. The American public is increasingly concerned about environmental issues and people are looking for ways to do their part to protect and restore our nation's resources. As customers have become more aware of the environmental impacts of the products they purchase, environmental awareness has begun to influence purchasing decisions.
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> The increasing interest in the environmental consequences of purchasing decisions has not been lost on the environmental community. . . . [M]any companies have begun claiming that their products provide some benefit to the environment. . . . [T]his marketing strategy, which has become known as "green marketing," can be informative to conscientious consumers when it used honestly. Unfortunately, attempts to take advantage of consumer interest in the environment have led to a growing number of environmental claims that are trivial, confusing or even misleading.

Association of Nat'l Advertisers v. Lungren, 44 F.3d 726, 727 (9th Cir. 1994) (citing THE GREEN REPORT).

As a result of dishonest "green washing," honest manufacturers have less incentive to invest in research and development of green products because they are unable to capture the true profits which should come from developing "green" products. If a manufacturer incurs the cost of developing a legitimate environmentally friendly product and honestly claims the product is eco-friendly, it cannot pass the costs of production on to the consumer, because the consumer – unable to distinguish genuine from dishonest

claims – may simply purchase the cheapest product making a green claim. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV. 991, 998 (1993).

The potential for false green advertising has led to an increased frequency of enforcement actions by states and by regulatory bodies such as the Better Business Bureau of the Federal Trade Commission. Israel, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENVTL. AFF. L. REV. 303 (1993). The Federal Trade Commission began filing enforcement actions against misleading environmental marketing as early as 1973, and it has maintained an active environmental marketing enforcement program over the years. *See* Luehr, *Guiding The Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL L. & POL'Y 311 (1992); *see also* Federal Trade Comm'n, Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992) (codified at 16 C.F.R. 260 (1994)) (revised by 61 Fed. Reg. 53,311, 53,316 (Oct. 11, 1996)).

Fear of deceptive advertising and consumer confusion has generated a demand for "green marketing" regulation at the state level as well. Cavanagh, *It's a Lorax Kind Of Market! But is it a Sneetches Kind of Solution?: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. 133 (1998). In a world of *caveat emptor*, honest information is the consumer's only defense. California has enacted remedial legislation to protect the environmental marketplace. CAL. BUS. & PROF. CODE § 17850.5. This "Green Marketing Act," which has already withstood a constitutional challenge (yet which would again be thrust into constitutional doubt if the California Supreme Court is overturned in this case), provides:

> It is unlawful for any person to make any untruthful, deceptive or misleading environmental marketing claim whether explicit or implied. For the purpose of this section, "environmental marketing claim" shall include any claim contained in the "Guides For the Use of Environmental Marketing Claims" published by the Federal Trade Commission.

Id. § 17850.5(2).

In enacting this statute, the California Legislature recognized the important public interest in ensuring that environmental claims are truthful, declaring "that it is the public policy of the State that environmental marketing claims, whether explicit or implied, must be substantiated by competent and reliable evidence to prevent deceiving or misleading consumers about the environmental impact of products or packages. *Id.*; *see also* Welsh, *Environmental Marketing and Federal Pre-Emption of State Law: Eliminating the "Gray" Behind the "Green*," 81 CAL. L. REV. 991 (1993); *Association of Nat'l Advertisers v. Lungren*, 44 F.3d 726, 727 (9th Cir. 1994). This effort would be undermined, if not completely undone, if this Court overrules the California Supreme Court's holding. Moreover, the negative impact could go much farther and cast doubt upon the government's ability to enact *any* consumer protection regulation that mandated what manufacturers could or should say both *about* their products and *in order to sell* their products.

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II. Truthful Information On Corporate Behavior Is Essential To Ensuring Corporate Accountability and Environmental Justice.

In a speech before a crowd of Wall Street business leaders, President George W. Bush announced, "[w]e must usher in a new era of integrity in corporate America . . . Self regulation is important, but it is not enough." President George W. Bush, Speech at the Wall Street Journal (July 9, 2002). Disillusioned Americans have been speaking out in droves on the need for a robust ethic of corporate responsibility, given recent financial scandals involving corporate giants such as Enron, WorldCom and Tyco, which caused public confidence in corporate America to fall to an all-time low. Similarly irresponsible corporate behavior has created the kinds of unfair labor practices, environmental destruction, health and safety violations, injury to children and overall deprivation of liberties that are at issue in this case.

In the environmental arena, accurate corporate disclosure of problems has become a mandatory obligation. The Securities and Exchange Commission requires publicly traded corporations to disclose environmental liabilities and other environmental conditions that may affect profitability. Particularly relevant to this case is the fact that even though companies are not required to report on their general environmental management policies, if they do those disclosures are required to be accurate and not misleading. Weintraub, *Required Corporate Disclosure Under Security and Exchange Commission Regulations, in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORY AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISK 251 (Michael B. Gerrard ed., 1999).

The regulation of corporate behavior is also is critical to the advancement of environmental justice. The principle of environmental justice is rooted in the belief that all people

have the fundamental right to a healthy environment, including the workplace. Dozens of laws, regulations, and policies require the incorporation of environmental justice principles and objectives. One of the most notable, Executive Order 12,898 mandates "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

Nike has been called to task for human rights, environmental and labor violations in its factories in Vietnam, China, Indonesia, Cambodia and Mexico. These human rights and environmental *injustices* bear heavily on Nike's reputation in the public eye, and Nike should be held accountable for truth in its image-making.

The global implications of Nike's behavior do not lessen the need for domestic regulation of its commercial behavior. Corporate actors sell their image in the domestic market and overseas, and in fact tend to violate the law worse in the absence of regulation. This does nothing to further democracy here or abroad.

The Sierra Club's Human Rights and the Environment Campaign echoes the U.S. Information Agency statement on promoting environmental justice and democracy: "Only through unfettered public debate and free elections can human rights be protected; only through a similar process of open debate and citizen involvement can the environment be protected. In the end, the work of environmental protection is the work of democracy." Sierra Club, *Human Rights and the Environment, Reports and Factsheets*, *at* www.sierraclub.org/human-rights/factsheet.asp.

The American consumer increasingly demands adherence to these same basic rights. Corporations know they ignore these morals at their risk. Several studies and business experts describe "failure to protect reputation . . . as a management failure." JUST PENSIONS: SOCIALLY RESPONSIBLE INVESTMENT AND INTERNATIONAL DEVELOPMENT-A GUIDE FOR TRUSTEES AND FUND MANAGERS 5 (May 2001). Pricewaterhouse Coopers avows: "[S]ociety increasingly demands that large multinational corporations improve their performance in areas of human rights, the environment, worker health and safety and other governance issues. Failure to address these demands has proved damaging to a company's most important asset - its reputation." *Id.* at 5 (citing Peters, *Human Rights: Is it any of your Business?* (Amnesty International, April 2000)).

Nike cannot be allowed to lie to the public about factually verifiable information such as wages and conditions in its factories, when the company's plain motives include commercial advantage. Environmental and all other forms of justice are best served by holding the company accountable for truth in its public actions.

III. The California Supreme Court's Decision Is Consistent With The Commercial Speech Doctrine And Its Emphasis On Preserving The Free Flow Of Accurate Information To Consumers.

For 200 hundred years it was thought self-evident that the government was free to regulate commercial enterprises, including their speech, to protect the commerce and the public interest. Indeed, this Court in 1942 felt the question of whether the government may regulate commercial advertising merited barely more than a sentence. *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (distribution of handbill with advertising on one side and protest on the other was advertising subject to government regulation). The years between 1942 and 1975, however, witnessed a

significant expansion in the role that advertising played in society and an increasing uncertainty as to the Constitutional status of some corporate speech, specifically advertising. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court held that commercial advertising enjoys limited first Amendment protection.

The contours of that protection were outlined more fully in *Virginia State Bd. of Pharmacy v. Virginia's Citizens Council*, 425 U.S. 748 (1976), and the Court articulated the controlling test for assessing commercial speech regulation in *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980). The resulting commercial speech doctrine represents an enclave of *limited* protection for certain types of commercial speech against a background in which most commercial speech is not considered protected by the First Amendment.[3] Thus, securities laws regulate what the issuers of securities may say about their company and its shares; legislation, regulation and the common law regulate the negotiation and enforcement of contracts; trademark and copyright law regulate what expressions may represent a form of "property," whose owners can enjoin others from using; communications between managers of different corporations can be regulated by the Sherman Act; and the criminal law may prohibit communications relating to fraud, extortion, bribery and misrepresentation. *See* Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. OF CIN. L. REV.

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[3] The backdrop against which Nike's speech takes place is one in which most speech is not protected. As Petitioner itself acknowledges, most commercial speech "had received essentially no protection at all," Petitioner's Brief at 25. The limited protection commercial speech has received is grounded entirely on the benefits to the public of receiving truthful information that is of interest to individual purchasing decisions. Thus, the default position is not, as Petitioner would have it, that if the commercial speech doctrine does not apply, full First Amendment protection does. Rather, the presumption is that the government is fully empowered to regulate commercial activity, including related speech, unless that speech is covered by the commercial speech doctrine.

1181, 1184 (1988); s*ee also* Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 20-21 (2000) (hereinafter Post, *Constitutional Status*) (quoting same). Thus, it is clear that all manner of "commercial" communications are not protected by the First Amendment.

Within the commercial speech doctrine, many governmental restrictions are permissible that would not be permissible under traditional First Amendment doctrine. Thus, in the area of commercial speech there is no prohibition on compelled or forced speech such as mandatory warning labels, listing of nutritional elements, chemical composition, ingredients, etc. The overbreadth doctrine and the prohibition on prior restraints are similarly suspended. *See* Post, *Constitutional Status* at 25-26. The First Amendment protection that was extended to commercial speech in the *Virginia Pharmacy* case, and which has been subsequently reaffirmed many times, encompassed only commercial speech that was "truthful and not misleading." "The First Amendment's concern for commercial speech is based on the informational function of advertising. *Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity*." *Central Hudson*, 447 U.S. at 563 (emphasis added) (internal citations omitted); s*ee also First National Bank of Boston v. Bellotti*, 423 U.S. 765, 783 (1978). Thus, speech that is not "truthful" does not qualify for even the limited protection available under the commercial speech doctrine.

It was because of the public interest in truthful commercial speech that this Court extended limited protection to commercial speech in the first place.

> So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic

> decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia Pharmacy at 765. Nevertheless, the Court did not conclude that because the free flow of information was "indispensable," the government was powerless to see that it was also a "clean" flow. The Court stated, "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely." *Virginia Pharmacy* at 771-72.

To the contrary, the Court concluded that the government could, in this area, regulate precisely what it could *not* regulate in other areas – truth. This power to regulate was held unproblematic because "the truth of commercial speech . . . may be more easily verifiable by its disseminator . . . . [because it] presumably knows more about [its product] than anyone else." *Virginia Pharmacy* at 772 n.24. This applies equally here, where Nike makes representations about its products and the conditions under which they are manufactured. Although it is in the best position to know the truth regarding its manufacturing processes and products, Nike would very much like to be free of the responsibility to tell the truth.

Contrary to Nike's claim that its failure to provide truthful information in this regard is not a "commercial harm," see Petitioner's Brief at 35-37, Nike's own actions demonstrate that it regards its image as a part of what it sells to the public. Therefore, all information affecting how the company is perceived may ultimately affect sales. That Nike would like the public to perceive its products as "'cooler' than the competition's," *see* Petitioner's Brief at 27, is beyond peradventure. The public exposure of Nike's labor practices made the company's product seem "un-cool," particularly

with young college students who make up an important part of Nike's market. Nike's statements were intended to restore the "cool" to Nike. That "cool" is undoubtedly connected to Nike's labor practices and is not solely related to price, product quality and the like, as Petitioner would like this Court to believe. *See* Petitioner's Brief at 35(no suggestion that products were defective or dangerous or of lesser quality). "The physical properties of . . . goods are important only to the degree that they affect consumers' perceptions!" SETTLE & ALRECK, WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT 70 (1986) (emphasis omitted). *See also* Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE L. REV. 377, 409-10 (2001). In the clothing business, as in many other enterprises, perception is all-important. And perceptions of the sort that Nike was attempting to create are an integral part of any manufacturer's advertising and promotional efforts. This is demonstrated by the surge of companies marketing themselves as "green."

IV. Petitioner's Claims That This Decision Unfairly Balances A Debate About A Matter Of Public Concern And That It Will Have A "Chilling Effect" On Accurate Information, Should Be Rejected As Unfounded And Inaccurate.

A. This Case Is Not About The Merits Of Globalization.

Nike would like for this Court to believe that this is a case about globalization, Petitioner's Brief at 2, or "broader social and moral issues," rather than merely selling sneakers. *Id.* at 41. However, the statements at issue here were not about the merits or demerits of globalization, a subject about which reasonable people may differ. Rather, its comments were about the facts of labor conditions in its factories. Nike wanted consumers, and those in a position to influence

consumer choices through purchasing decisions or reporting, to believe that the charges made against it in the press were untrue. Kasky claims that Nike attempted to create this belief without regard to the truth of its claims. Yet Nike urges this Court recognize a Constitutional right for Nike to respond to its critics with misinformation packaged as a "valuable contribution to public understanding and discussion . . . ." *See* Petitioner's Brief at 41. It is difficult to understand how misinformation contributes anything to "public understanding." Indeed, with respect to commerce, this Court has said that misinformation most unequivocally does not contribute to public understanding, and is in fact antithetical to the well-being of the market. *See, e.g.*, *Central Hudson*, 447 U.S. at 563 ("The government may ban forms of communication more likely to deceive the public than to inform it"). Nike cannot insulate itself from this responsibility by claiming that these facts are also relevant to the debate on globalization.[4]

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[4] In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), the Supreme Court considered whether a state university regulation that prohibited "Tupperware parties" violated the First Amendment because the company's advocacy of home economics – such as advice on how to be financially responsible and how to run an efficient home – was claimed to be "inextricably intertwined" with the sale of Tupperware. Writing for the majority, Justice Scalia first rejected the effort to categorize such speech as non-commercial, stating that: "[n]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares . . .. Nothing in the nature of things requires [these non-commercial messages] to be combined with commercial messages." *Id.* at 474.

B. Requiring Nike To Ascertain The Accuracy Of Its Statements Before Disseminating Them Does Not Impose An Onerous Burden.

As this Court observed in *Virginia Pharmacy*, "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides *and presumably knows more about than anyone else*." *Id.* at 772 n.24 (emphasis added). This is in contrast to situations like that in *First National Bank of Boston v. Bellotti*, 423 U.S. 765 (1978), where corporations sought to contribute money and speak on issues that did not relate "to issues that materially affect its business, property, or assets," *id.* at 767, or involve matters on which it was the *source* of information rather than merely a commentator opinion. Not only is Nike in the best position to verify the truth of its own statement, it may be the only entity in a position to do so – at least without laborious, and perhaps even intrusive, investigation into those operations. If it is difficult for Petitioner to ascertain the truth of any particular representation, how much more difficult will it be for anyone outside of the company to discern the truth without its cooperation, when the information is unflattering and thus likely to hurt sales?

C. Claims Of Chilling Effects In This Context Should Be Viewed With Skepticism.

Nike claims that the "chilling effect of the legal regime approved [by California] is fact, not hypothesis or prediction." Petitioner's Brief at 38. Among other things Nike notes that it has declined to participate in the *Dow Jones Sustainability Index* and has declined to issue a Corporate Responsibility Report. *Id.* at 39. However, the argument that a modest state-imposed requirement that companies tell the

truth when they characterize their products as "sweatshop-free" or "environmental friendly" will reduce the willingness of companies to make honest statements about their products should be taken with a grain of salt. It is even more doubtful that a reasonable requirement that companies tell the truth in touting their products will have a chilling effect on the willingness of members of the general public to express their views.

CONCLUSION

The citizens of California have a substantial interest in truthful information about the market, whether or not one goal of that advertising is to improve a corporation's image. All advertising attempts to improve that intangible thing – the company's "image." It is fair to say that the bulk of all advertising is directed at creating a positive "feeling" or image to be associated with the product or service. Honest competitors in the marketplace, such as those producing food organically, providing "clean" sources of energy, or using sustainable techniques to harvest natural resources, should likewise be free from the threat of unfair competitors making false claims about their environmental practices or products. *See generally*, Gardener, *How Green Were My Values: Regulation of Environmental Marketing Claims*, 23 UNIV. TOLEDO L. REV. 31 (1991).

For environmental claims – no less than for the "sweatshop-free" claims present in this case – the manufacturer has a near monopoly on relevant information, putting unknowing consumers and competitors at a serious disadvantage in their ability to investigate or refute the manufacturer's false or misleading factual statements. Representations, for example, that manufacturers use "clean" sources of energy generation or make use of only organic production practices, are based on information that is virtually impossible to "test" in the "marketplace of ideas" because it is largely in the hands of the company making

those representations. To allow fraudulent or deceptive claims in such circumstances, so long as they are also intended to promote favorable "corporate image," would allow unscrupulous companies to undermine the ability of the marketplace to steer manufacturers toward worker – and environment – friendly production processes.

A settled body of constitutional authority makes clear that states retain the ability to regulate misleading advertising, whether or not it deals with the characteristics of a product or how it was manufactured, and whether or not it was intended to promote a more favorable corporate image. *See, e.g., In re R.M.J.*, 455 U.S. 191, 203 (1982) ("[m]isleading advertising may be prohibited entirely"); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 100 (1990); *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) ("our cases make clear that the State may ban commercial expression that is fraudulent or deceptive without further justification"). The Respondent in this case seeks only to enforce California's Unfair Business Practices statute guaranteeing such rights. Nothing in the United States Constitution precludes the Respondent from doing so. This Court should uphold the California Supreme Court's decision.

Respectfully submitted,

Patrick Gallagher
(Counsel of Record)
Kristin Henry
Denise Hoffner-Brodsky
Sierra Club
Environmental Law Program
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5709
(415) 977-5793 fax

Thomas O. McGarity
University of Texas
School of Law
727 E. Dean Keeton Street
Austin, TX 78705

Tamara R. Piety
University of Tulsa
College of Law
3120 E. 4th Place
John Rogers Hall
Tulsa, OK 74104

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