No. 02-575

In the

Supreme Court of the United States

October Term, 2002

NIKE, INC., ET AL.,
PETITIONERS

v.

MARC KASKY,
RESPONDENT

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE

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CONSENT TO FILE

Written consent to file in this matter was provided by all parties and is on file with the Clerk of this Court.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press against threats in many forms. The Center has participated actively in the litigation of First Amendment issues, and has filed *amicus curiae* briefs in the United States Supreme Court, the Federal Courts of Appeals, and in numerous state courts.

The Media Institute is an independent, nonprofit research organization. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, competition within the communications industry, and journalistic excellence.

NATURE OF CASE AND STATEMENT OF FACTS

The California Supreme Court ruled that the state's false advertising law may be invoked to enjoin corporate statements which explain a company's labor policies and practices to the general public. That result follows, declared a bare majority of the California court, from the source and context of the message, if a corporate speaker, "to promote and defend its sales and profits, makes factual representations about its own products or its own operations . . . ." *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002).

The case arose when a California citizen invoked against a footwear manufacturer a state statute designed to curb false advertising and unfair competition. The plaintiff claimed that the company had made false statements in the course of explaining its labor policies and practices to the general public. Those statements had been issued in response to widespread criticism of the company's alleged exploitation of workers at certain offshore manufacturing sites. The complaint alleged that the corporate statements at issue contained false and misleading material;

consequently, the plaintiff urged that the statements were subject to, and in violation of, the California law regulating false advertising.

The Superior Court and the Court of Appeals rejected these claims, ruling that such explanatory corporate statements were non-commercial speech, and were accordingly not subject to the false advertising law. The California Supreme Court, however, reversed by a 4-3 margin, and concluded that these corporate statements should be deemed commercial speech because they had been issued by a business entity, were directed to a commercial audience, and related to the company's business operations in ways that might enhance the market for the company's products. Thus the statements were not , in the supreme court's view, entitled to the high degree of First Amendment protection that the lower courts had accorded them. Three justices dissented, citing what they believed to be serious departures from precedents both of their court and of this Court regarding the status of commercial speech. The defendant company promptly sought review by this Court of the substantial First Amendment issues raised by the California Supreme Court decision.

SUMMARY OF ARGUMENT

Under settled First Amendment principles which this Court has clearly and consistently announced, the corporate statements at issue lie well beyond the reach of injunctive or damage claims. Properly viewed as non-commercial speech, Nike's messages could clearly not be enjoined by any court. Nor could such statements give rise to civil liability in the absence of defamatory or otherwise actionable content, the presence of which has not been claimed here. To impose such liability would represent a basic affront to First Amendment principles.

The judgment of the California Supreme Court reflects several severely flawed premises, which blend to create a dangerous departure from this Court's settled principles of freedom of expression. First, the court below took a disparaging view of statements by a corporate speaker, effectively treating all communications by a business entity, designed in any degree to "promote and defend its sales and profits," as undeserving of full First Amendment protection. This Court has, for over a half century, recognized that neither a profit motive nor a corporate source in any

way disqualifies speech on matters of public importance from full constitutional protection.

Second, the ruling of the court below reflects a dangerously truncated interpretation and application of the doctrine of commercial speech; it presumes that statements which might enhance the appeal of commercial products (even though focused on the speaker's "operations" rather than on products per se) must for that reason be treated as "commercial speech" and thus receive substantially lesser First Amendment protection. To the contrary, many judgments of this Court recognize that not all statements which may pertain to a commercial product, or which may be of interest to consumers of that product, are properly classified as commercial speech and for that reason deprived of full constitutional protection.

Third, by effectively hobbling the corporate speaker in any debate over issues of public importance (such as a manufacturer's offshore labor policies), the California Supreme Court's ruling creates a degree of viewpoint discrimination that is incompatible with this Court's judgments in cases such as *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In effect, the non-corporate speaker's

claims and accusations receive full First Amendment protection, while the corporate speaker's response to those claims, addressing precisely the same issues in public debate, receives substantially lesser protection – a disparity that is clearly at variance with this Court's insistence on viewpoint neutrality.

Finally, the views expressed by the two lower state courts, and by the three dissenting justices in California's highest court, surely would not deprive California consumers of essential protection from false advertising or deceptive claims by corporate speakers. The commercial speech doctrine, properly applied to advertising as this Court has defined it, contains ample safeguards through which government may regulate misleading or exploitive statements by business entities, without compromising free expression in the marketplace as the ruling challenged here inevitably does. For these reasons, *amici curiae* respectfully urge the reversal of the judgment of the California Supreme Court as a dangerous departure from First Amendment principles.

ARGUMENT

I. NEITHER A PROFIT MOTIVE NOR A CORPORATE SOURCE WARRANTS LESSER FIRST AMENDMENT PROTECTION FOR THE SPEECH OF A BUSINESS ENTITY.

A central premise of the California Supreme Court's judgment is that "the marketplace of ideas" does not encompass the commercial marketplace. This Court first recognized the fallacy of that view more than a half century ago, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). In that case, New York State invoked this Court's judgment in *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), which did indeed deem a profit motive or commercial business activity as dilutive of a motion picture producer's or distributor's claim of First Amendment protection. But the *Burstyn* Court rejected that assumption once and for all, noting that the fact "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." 343 U.S. at 501. Indeed, the Court added that "we fail to see why operation for profit should have any different effect in the case of motion pictures." *Id*. at 502.

Later cases have consistently reinforced the principle that a profit motive or corporate status does not deprive a speaker of full constitutional protection. Thus, in *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978), this Court noted that "the inherent worth of the speech in terms of its capacity for informing the public did not depend upon the identity of its source, whether corporation, association, union or individual." In a similar vein, this Court several years later observed that "[c]orporations . . . contribute to the 'discussion, debate and dissemination of information and ideas' that the First Amendment seeks to foster." *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 8 (1986) (plurality opinion) (quoting *Bellotti*, 435 U.S. at 783). In other cases involving corporate challenges to government restrictions on expression, this Court has simply assumed, without needing to elaborate, that a profit motive or a business context would not disadvantage a speaker or warrant a lesser degree of First Amendment protection. *C.f. Hustler Magazine v. Falwell,* 485 U.S. 46, 53 (1988) ("In the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.")

Although they have seldom been fully articulated, sound policy considerations buttress this Court's consistent view that neither corporate status nor a profit motive forfeits the right to speak freely on matters of public concern. The most frequently invoked premises of First Amendment protection apply no less clearly when the speaker happens to be a business entity operating for private profit. The Jeffersonian belief that free expression is vital to informed participation in government by a responsible citizenry draws no distinction between or among the sources of information, some of which is likely to come from business entities, whatever may be the degree of their self interest. Constitutional scholar Alexander Meikeljohn's twentieth century reaffirmation of the essentiality of a well-informed citizenry as the rationale for free expression is similarly devoid of any distinction based upon the corporate status or the profit motive of the speaker. *See* Alexander Meikeljohn, Free Speech and Its Relation to Self-Government (Oxford University Press 1948).

Indeed, that view is wholly consistent with this Court's recognition, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 765 (1976), that "[i]t is a

matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed," and that the "free flow of commercial information" advances this goal. On any of the several rationales that justify substantial First Amendment protection for commercial speech, Professor Martin Redish and Howard Wasserman are clearly correct to insist that "the fact that a corporation's speech is directed toward the goal of economic gain should not distinguish it from other associational forms for First Amendment purposes." Martin H. Redish & Howard M. Wassermann, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 255 (1998).

It would be naïve, of course, to claim that a speaker's corporate status may never be germane to First Amendment analysis. There are at least two familiar contexts in which the source and the motive for a business entity's communication may bear upon the scope of permissible regulation. One such context is that of political contributions, where this Court has properly recognized that money paid by a corporation (or a labor union) may be regulated to a degree that is not appropriate for political contributions from individuals.

E.g., *FEC v. National Right to Work Committee*, 459 U.S. 197, 208-211 (1982). Yet the very specificity of such restraints, focused as they are upon the risk of corruption or the appearance of corruption that corporate contributions present, *see Bellotti*, 435 U.S. at 788-789, makes clear the untenability of a blanket disqualification of all corporate speakers even in the sensitive political-campaign arena. Such a narrow focus also offers reassurance that where corporate communications do pose a clear risk to valid regulatory interests, government is not powerless to intervene.

The other context in which a speaker's corporate status or profit motive may bear upon expressive interests is, of course, commercial advertising. Where a corporate message "does no more than propose a commercial transaction," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976), this Court has recognized that a lower standard of First Amendment protection is appropriate; for example, deceptive or misleading claims are not protected as they would be in non-advertising statements. *Id.* at 771-773. The central question – to which the next section of this brief is addressed – is the degree to which other messages in the commercial context may properly be denied full

First Amendment protection. For present purposes, however, the point is simply to illustrate another context in which the corporate status of the speaker, as well as the goal and context of the message, are not wholly irrelevant to defining the proper scope of First Amendment protection. Yet here, as with political contributions, the sharply limited nature of the exception reinforces the fallacy of any claim that corporate speakers or profit motives are categorically disabling.

II. THE COMMERCIAL SPEECH DOCTRINE SHOULD NOT LIMIT FIRST AMENDMENT PROTECTION FOR SUCH CORPORATE COMMUNICATIONS AS THOSE AT ISSUE IN THIS CASE

Contrary to the premise of the judgment below, not all corporate communication – indeed, not even all "advertising" – may be relegated to a second class status under the First Amendment. The history and evolution of the doctrine of commercial speech bear closely upon the central issue of this case – whether the California Supreme Court correctly classified Nike's corporate statements about its offshore labor policies as entitled only to diminished First Amendment protection. This Court's treatment of an analogous

issue in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) is highly instructive. At the time of that decision, advertising was wholly unprotected under *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Only Justice Douglas, in his concurrence in *Cammarano v. United States*, 358 U.S. 498 (1959), had suggested a contrary view. Yet, in *New York Times* Justice Brennan made clear that *Valentine* barred protection only for "purely commercial advertising" and in no way diminished protection for "the freedom of communicating information and disseminating opinion." 376 U.S. at 265-66. Thus, it was wholly irrelevant to First Amendment interests that the message which was the focus of Commissioner Sullivan's libel suit appeared under the "advertisement" rubric, had been paid for by the ad's sponsors, and was published in a for-profit medium. The statement in issue, said Justice Brennan in distinguishing *Chrestensen*, "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are of the highest public interest and concern." *Id.* at 266.

The emergence more than a decade later of the commercial speech doctrine in no way undermined the *New York Times*

distinction. Indeed, by focusing on speech which "does no more than propose a commercial transaction" as a now partially protected type of message, this Court in *Virginia Board of Pharmacy,* 425 U.S. at 762, implicitly preserved the rationale for treating more favorably that corporate-sponsored speech which is more closely akin to the *New York Times'* editorial advertisement. While this Court has declined several invitations to define more precisely the contours of "commercial speech," its decisions applying this doctrine have never relegated to the status of lesser protection any corporate communications of the type that have been targeted in the present case.

Especially instructive is Justice Marshall's majority opinion in *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60, 61-75 (1983). That case dealt with mass mailings which unambiguously promoted specific contraceptive products to potential consumers, albeit accompanied by "informational pamphlets" which promoted contraceptives in general as well as the advertiser's own products. The *Youngs* Court did eventually conclude that such mailings were properly treated as "commercial speech," noting that "advertising which 'links a product to a current public debate' is not thereby

entitled to the constitutional protection afforded non-commercial speech." *Id.* at 68. Nonetheless, the majority raised important cautions about the classification process, warning against intuitive assumptions based on the content of corporate messages. For the *Youngs* court, "the mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. . . Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech." *Id*. at 66 (citing *New York Times,* 376 U.S. at 265-66). In its decision in this case, the California Supreme Court majority seized on the footnote clarification in *Youngs* that a generic reference to a *product* in advertisements "does not . . . remove it from the realm of commercial speech." *Id.* at 67, n.13. Ironically, this reference actually implies that *non-product* focused statements, such as the ones at issue here, should be exempt from commercial speech restrictions. Nothing in *Youngs'* other cited footnote alters that implication; Justice Marshall's caution that "we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech" simply left that issue entirely open in a case where the promotional materials were

unmistakably product-specific. *Id.* at 68, n.14. Moreover, the undoubted "economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech." *Id.* at 67.

Although the commercial speech doctrine has experienced many ebbs and flows since *Youngs*, the basic concepts that were shaped two decades ago have proved remarkably durable. No corporate communications that were completely divorced from promotion of a specific product have been found by this Court to constitute "commercial speech." Although it is true that Justice Stevens, beginning with his *Youngs* concurrence, has urged a sharper delineation between commercial and non-commercial expression, *id.* at 80, (Stephens, J., concurring), other members of this Court have deemed that task unnecessary given the ease of classification in most of the later cases and an outcome almost invariably consistent with a narrow view of what constitutes "commercial speech." The present case, for the first time, compels an analysis of that issue and demarcation of the line between fully and partially protected corporate speech.

The circumstances of this case not only call for such a distinction, but also offer an admirable vehicle for its application. Nike, like any manufacturer of goods or services promoted to the consuming public, engages in a substantial amount of product-specific print and broadcast advertising which is unmistakably commercial speech. If and when such advertising contains false, deceptive or misleading claims, regulation is surely appropriate to a degree that would not be acceptable for non-commercial speech. Consumers who have suffered injury by reason of any false or deceptive advertising claims might well have legal recourse under the California statute invoked in this case or similar laws of other states. Even where advertising may seek to advance the popularity of casual footwear over more formal attire, the inevitable citation of specific Nike products would cause such messages to be properly classified as "commercial speech." No matter how subtle the "proposal of a commercial transaction" may be, such messages are advertising pure and simple and, therefore, enjoy only limited protection under the First Amendment.

Where Nike or any other manufacturer responds to widespread criticism of its personnel policies and practices, however, the

situation is starkly different. Even though a favorable corporate image may not be wholly irrelevant to the market for footwear, the company is no longer selling shoes. Rather, it is engaging in debate on an issue of public importance and interest, much like the paid advertisement in *New York Times* which, as Justice Brennan explained, "communicated information, expressed opinion, . . . [in the context of] matters of the highest public interest and concern," 376 U.S. at 266. In such circumstances, corporate communications, like the informational mailings in *Youngs* (albeit more directly tied to specific products than are Nike's messages) are not inevitably "commercial speech" simply because they may enhance the market for products the direct advertising of which would merit lesser protection.

The core rationale of the commercial speech doctrine reinforces such a distinction. As this Court made clear in *Virginia Pharmacy*, a basic premise of partial protection for advertising is to maintain the free flow of potentially valuable information to consumers. The Court recently reaffirmed in *44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996), that the central reason for protecting truthful advertising is "the public's interest in receiving accurate commercial

information." To the extent that a well informed consumerate requires that government not "seek to keep people in the dark," *id.* at 503, that very interest argues for the widest scope of protection for information bearing not only (or even primarily) on choices among products, but far more broadly on social and economic policy. To presume that messages on one side of a profoundly important public debate cannot be fully trusted simply because they come from a corporate source reflects the sort of unacceptable "paternalism" which this Court has repeatedly condemned in its commercial speech cases. *E.g., id.* at 497.

Moreover, to the extent that potentially false or misleading information may pose concerns in messages such as those now in issue, the normal operation of the marketplace of ideas would provide any needed correction or refutation in ways that may not be fully trustworthy in regard to specific product advertising. If Nike should misstate or falsify any facet of its offshore labor policy, there will be no shortage of corrective information; indeed, this is the very type of situation that Justice Brandeis envisioned three quarters of a century ago, in which "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of

education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The quest in such a debate should be for truth, a value best served by maximizing the range of views that may be offered and tested in the marketplace of ideas.

Indeed, even pure "commercial speech" that is neither false nor misleading is often subject to the corrective measures of the marketplace. Such was the case several years ago when, in response to public protest, Nike withdrew its infamous "chainsaw" television commercial in which a female Olympic athlete was able to out-sprint a chainsaw murderer by virtue of her Nike running shoes. *C.f.* Lisa D'Innocenzo, *What Were They Thinking?,* Strategy, August 26, 2002, at 7. For the foregoing reasons, the corporate communications challenged here should be treated as non-commercial speech. Neither their corporate sponsorship, nor their potential to enhance the public image of that sponsor in ways that might incidentally promote shoe sales, warrants so major a metamorphosis of the commercial speech doctrine.

III. TREATING SUCH CORPORATE COMUNICATIONS AS "COMMERCIAL SPEECH" IS UNACCEPTABLE VIEWPOINT DISCRIMINATION.

If corporate communications such as those at issue here are deemed to constitute "commercial speech," and on that basis receive only partial First Amendment protection, government would effectively be taking sides in a vital public debate of importance. While a critic of the company or its employment practices is entirely free to publish deceptive or misleading accusations (subject only to an unlikely libel suit), the corporate target is hobbled in its response to such criticism if it may invoke only the less protective scope of commercial speech. The effect of such a distinction would be precisely what Justice Stevens warned forcefully against in *Youngs*: "[The challenged postal regulation] excludes one advocate from a forum to which adversaries have unlimited access." 463 U.S. at 84.

When government fully protects statements critical of corporate policy while inhibiting responsive statements simply because they come from the other side, it takes sides in the debate and thereby embraces the type of viewpoint discrimination this Court condemned in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and later cases,

e.g., *Rosenberger v. Rector and Visitors*, 515 U.S. 819 (1995). As Professor Redish wisely observed, "A ban on corporate speech . . . does not equalize the debate but rather tilts the debate entirely in the other direction: the most effective contribution to one side of the public debate is effectively silenced." Redish & Wasserman, *supra* at 291.

Indeed, the inevitable effect of the challenged California Supreme Court ruling illustrates the hazards of allowing government to take sides in an important and timely public debate. Corporate explanations and extenuations may well be self-serving; indeed, only an imprudent, if not irrational, company would pass up an opportunity to enhance its corporate image in the process of issuing such public statements. But the presence of such presumed bias or self-interest hardly warrants relegating all corporate refutation or rebuttal to a lower level of First Amendment protection, as the ruling below does. The proper resolution is to treat such messages as non-commercial, if indeed they primarily convey information and opinion, and to treat as commercial speech only those messages that (in the words of the *Youngs* Court) "link . . . a product to a current public debate." 463 U.S. at 68.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse the judgment of the court below and to remand the case for further proceedings consistent with this Court's settled principles of First Amendment protection for non-commercial expression.

Respectfully submitted,

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